Supreme Court U.S.
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No.

In the Supreme Court of the United States

EXIDE TECHNOLOGIES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's decisions requiring application of state law in *United States v. Bestfoods*, 524 U.S. 51 (1998); *Atherton v. FDIC*, 519 U.S. 213 (1997); and *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), did the Court of Appeals for the Third Circuit err in holding that corporate successor liability for environmental cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) should be determined by creating and applying federal common law, rather than applicable state law?

2. Did the Court of Appeals err in crafting a federal law of corporate successor liability for CERCLA cases that is at odds with the Pennsylvania law that would otherwise apply?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are named in the caption.

Throughout the proceedings in this case, petitioner has been identified as Exide Corporation, but it has now changed its name to Exide Technologies. Exide is the successor by merger to General Battery Corporation, which no longer exists as a separate company. On April 15, 2002, Exide filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Exide emerged from bankruptcy in May 2004, but the claim in this case remains subject to bankruptcy court jurisdiction.

CORPORATE DISCLOSURE STATEMENT

Exide has no parent corporation. Except for Sterling Capital Management LLC, which owns approximately 14.1% of Exide's stock, no company holds 10% or more of Exide's stock.

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Petition for a Writ of Certiorari To the United States Court of Appeals For the Third Circuit

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This Court has repeatedly instructed that federal courts are not to fashion "federal common law" to fill the interstices of federal causes of action when state rules of decision can be used instead. *See United States v. Bestfoods*, 524 U.S. 51 (1998); *Atherton v. FDIC*, 519 U.S. 213 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994). But the decision below did just that, holding that because of a perceived need for "uniformity" in federal actions under CERCLA, the court should fashion a federal rule of decision to govern corporate successor liability for environmental cleanup costs, rather than applying the law of the state at issue. The Third Circuit's decision conflicts with the decisions of this Court and with those of courts of appeals that have followed this Court's pronouncements. And it leaves in its wake a tattered framework for resolving corporate liability issues under CERCLA that fosters neither the uniformity nor the certainty that the court sought to achieve. This Court therefore should grant certiorari and direct that the Third Circuit abandon its effort to create a federal body of corporate succession law.

OPINIONS BELOW

The opinion below, A1-A44, is reported at *United States v. General Battery Corp.*, 423 F.3d 294 (3d Cir. 2005). The opinions of the district court, A45-77, are unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on September 6, 2005. Exide's timely petition for rehearing was filed on October 20, 2005, and denied on November 4, 2005. On January 20, 2006, Justice Souter extended the time within which to file this petition to and including April 3, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant excerpts from CERCLA – the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* – are set forth at A82-A88. They include Sections 101, 107(a), (b) & (e), 113(f), and 301(e), 42 U.S.C. §§ 9601, 9607(a), (b) & (e), 9613(f), and 9651(e).

STATEMENT OF THE CASE

Exide is the successor by merger to General Battery Corporation. In 1966, General, a manufacturer of batteries and other products at plants throughout the United States, purchased the assets of Price Battery Corporation, a battery manufacturer in Hamburg, Pennsylvania. This case concerns the Government's efforts to hold Exide liable for the conduct of Price prior to the 1966 asset purchase.

Under the 1966 agreement, Price sold General its machinery and other equipment for $2.95 million in cash and 100,000 shares (4.537% of the total outstanding shares) of General stock worth approximately $1 million. Price sold its realty to a local development fund for $1.8 million in cash, and General then leased the realty from that fund. In all, then, Price received $4.75 million in cash for its assets (82.6% of the total purchase price), plus the stock.

The agreement provided that Price's chairman and sole shareholder, William Price, Sr., would become a director of General and that General would employ Price's middle managers. General assumed Price's contracts and the liabilities on Price's books and agreed to indemnify Price for claims arising out of Price's operations, but, significantly, *not* for "liabilities sounding in tort or liabilities arising out of occurrences for which a tort claim would apply."

Following its acquisition of Price's assets in Hamburg, General made batteries at the Hamburg facility (em-

ploying battery case disposal methods different from the practices of Price that gave rise to the CERCLA liability judgment at issue here). Meanwhile, Price changed its name, ceased operations, and dissolved in July 1967.

CERCLA was not enacted until 1980. This case was filed 20 years after that, in June 2000, in the United States District Court for the Eastern District of Pennsylvania. In its complaint, the United States contended that Price disposed of battery casings containing lead at sites in the Hamburg area and that the United States now must remediate resulting environmental damage.

The Government sought to hold General (and, therefore, Exide) liable as Price's corporate successor. It argued that, as a matter of "federal common law," General should be excepted from the rule that a corporate successor is not liable for its predecessor's misconduct because the 1966 asset sale constituted a "*de facto* merger" or because General engaged in a "substantial continuation" of Price's business. The trial court (Buckwalter, J.) agreed and entered summary judgment for the United States. A50-A72.

Exide appealed, contending that Pennsylvania law, rather than federal common law, should have been applied to the claims of successor corporate liability and that, under Pennsylvania law, General (and therefore Exide) would not be liable for environmental damage caused by Price. In its response, the Government abandoned its reliance on federal common law, but still advocated a *de facto* merger theory not grounded in Pennsylvania precedent.

In a September 6, 2005 opinion by Chief Judge Scirica that was joined by Judge Fisher, the Court of Appeals affirmed. In doing so, the court specifically adhered to its holding in *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989), that issues of corporate successor liability under CERCLA are governed by federal common law, as derived from

"the general doctrine of successor liability in operation in most states." A6-A7.

The Court of Appeals declined to overrule *Smith Land* despite this Court's recent decisions disapproving use of federal common law. It explained that *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and *Atherton v. FDIC*, 519 U.S. 213 (1997), were inapposite because they dealt with banking law, not CERCLA. A8-A9. The court said that *United States v. Bestfoods*, 524 U.S. 51 (1998), a CERCLA case, "cuts in favor of a uniform federal standard" because in it this Court "declined to apply Michigan law and instead looked to the general 'hornbook' rule of veil-piercing." A9-A10. The Court of Appeals insisted that a need for national uniformity in applying CERCLA should control, and it concluded that this objective could best be served by adopting a federal common-law rule based on the law of most states, rather than applying the non-uniform successor liability laws of individual states. A11-A17.

The court then formulated a federal common-law rule to govern General's acquisition of Price's assets. The court recognized that "most states" hold that corporate asset buyers are *not* liable for the selling company's misconduct. But it fashioned an exception for "*de facto* mergers" based on a four-part test derived from federal cases purportedly stating a "majority" standard and from the *Fletcher Cyclopedia of the Law of Private Corporations* (vol. 15, § 712...20 (perm. ed., rev. vol. 1999)). A19-A20. The court concluded that state law is "unsettled" on whether asset purchases for a mixture of cash and stock (or for a small percentage of the buyer's stock) should be treated as *de facto* mergers. A12-A13. Nevertheless, after citing federal and state decisions from just six jurisdictions, the court adopted a federal rule based on what the "critical . . . inquiry appears to be." A21-A24 & nn. 9-10. Under this new rule, the court held that General's acquisition of Price's assets was a *de facto* merger for purposes of CERCLA, so that Exide was liable for Price's conduct. A26.

In a separate opinion dissenting in part, Judge Rendell concluded that this Court's recent decisions preclude creation or application of "federal common law" and supersede anything to the contrary in *Smith Land*. The majority's decision, she opined, "runs counter to recent Supreme Court pronouncements," "perpetuates a split among the courts of appeals," and improperly adheres to an "outdated notion of promoting uniformity." A28-A29.

Because of its decision to formulate a federal common-law rule, the Court of Appeals declined to determine how Pennsylvania would decide the question before it. A16-A17. In dicta, it suggested that its standard "generally tracks the Pennsylvania rule," A26, a view that Judge Rendell echoed, A44. But on the "unsettled" issue of asset sales for cash or minuscule stock interests, neither opinion cited or discussed Pennsylvania authorities.

Exide filed a petition for rehearing and rehearing en banc. The court denied the petition on November 4, 2005, with Judges Rendell and Ambro voting to grant rehearing en banc. A80-A81.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT MANDATING APPLICATION OF STATE LAW TO FILL GAPS IN FEDERAL STATUTES.

This Court's decisions make clear that the Court of Appeals' creation and application of a "federal common law" to determine successor liability under CERCLA was error. Even the Government recognized that fact when its brief to the Third Circuit failed to advocate such a theory. By its election nevertheless to employ "federal common law," the court below decided this case in a way that conflicts with the law that should have been applied – that of Pennsylvania.

In *O'Melveny*, this Court held, unanimously, that state law – not federal common law – governs actions by the FDIC for legal malpractice and breach of fiduciary duties in connection with failed savings and loan associations. Quoting *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), that "there is no federal general common law," the Court emphasized that creation of federal common law is justified only "where there is a 'significant conflict between some federal policy or interest and the use of state law'" and that "the existence of such a conflict [is] a precondition for recognition of a federal rule of decision." 512 U.S. at 83, 87-88. In *Atherton*, this Court reiterated that view, holding (again, unanimously) that state law, rather than federal common law, governs the standard of care applicable to the corporate governance of federally chartered banks. 519 U.S. at 218-25. These decisions set forth clear limitations on employing federal common law in *any* type of action and are controlling here. *See also United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979).

This Court's more recent decision in *Bestfoods* confirms that state law should apply in this case. In *Bestfoods*, this Court unanimously affirmed the Sixth Circuit's application of Michigan veil-piercing law in holding that a parent company may be held liable under CERCLA for its subsidiary's conduct. 524 U.S. at 60, 63-64. Contrary to the Court of Appeals' suggestion below, A9-A10, this Court did *not* reject application of Michigan law. While the parties' positions made it unnecessary to decide whether to apply state or federal law, *see* 524 U.S. at 63-64 n.9, this Court pointedly noted that CERCLA had not displaced "well-settled" rules of state corporate law:

> CERCLA is thus like many another congressional enactment in giving no indication "that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute," and the failure of the statute to speak to a matter as

> fundamental as the liability implications of corporate ownership demands application of the rule that "in order to abrogate a common-law principle, the statute must speak directly to *the question addressed by the common law.*"

Id. at 63 (quoted citations omitted). In the decision below, the Court of Appeals failed to heed this warning. Moreover, this Court in *Bestfoods* rejected the trial court's formulation of special rules for holding a parent company liable as a facility "operator" under CERCLA because they threatened to displace traditional state veil-piercing standards without congressional authorization to do so. *Id.* at 70. Nevertheless, the decision below adopted a CERCLA-specific rule of corporate successor liability.

O'Melveny and its progeny clearly called for the rejection of federal common law in this case. As the majority opinion below itself recognized –

> [T]he Supreme Court in *O'Melveny* cautioned against the unwarranted displacement of state law, holding that state rules of decision generally fill interstitial gaps in federal statutes. 512 U.S. at 87. The displacement of state law is particularly disfavored in the area of corporate law, because business decisions typically proceed in reliance on the applicable state standards. . . . State corporation law generally should be integrated into the federal statutory regime, unless there exists "a significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87 . . . .

A8 (some citations omitted); *see also* A41-A42 (opinion of J. Rendell).

Even the court below agreed that there is no conflict between Pennsylvania law and CERCLA's purpose of

holding liable those responsible for the cost of cleaning up hazardous wastes. *See* A16. Those courts of appeals that have considered this issue since the decision in *Bestfoods* agree that there is no state law conflict. *See United States v. Davis*, 261 F.3d 1, 53 (1st Cir. 2001); *Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc.*, 159 F.3d 358, 363-64 (9th Cir. 1998). Indeed, CERCLA itself prevents state law from adversely affecting the Government's ability to obtain compensation from polluters by making the principals of polluting companies (such as William Price, Sr., who sold his company's assets to General) directly liable in a cost recovery action. *See* CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2); *Bestfoods*, 524 U.S. at 64-65.

By basing its decision on a need for "national uniformity" in CERCLA's application, A16-A17, the Third Circuit elevated an interest that this Court already has rejected. This Court held in *O'Melveny* that uniformity was an insufficient basis for creating a federal common law for the FDIC: "Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty – but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in 'federal common-law' rules." 512 U.S. at 88. *See also Atherton*, 519 U.S. at 219-21. That observation applies with full force here.

There is no indication that Congress desired to create uniform federal rules to govern CERCLA's interstices. A self-described "comprehensive" statute, CERCLA specifically sets forth when federal law applies to a cause of action. *E.g.*, CERCLA §§ 101(32), 42 U.S.C. § 9601(32) (incorporating Clean Water Act liability standards), 113(f), 42 U.S.C. § 9613(f) (contribution standards). Moreover, in CERCLA itself, Congress recognized that it was not supplanting all state common-law rules and created a commission to study whether any of them should be changed through *future* federal legislation. *See* CERCLA § 301(e), 42 U.S.C. § 9651(e). Under *O'Melveny*, when a federal statute

embodies selected federal rules of decision and is otherwise silent, courts are not free to tinker with Congress' scheme by applying additional "federal common-law" rules; doing so "is not to 'supplement' this scheme, but to alter it." 512 U.S. at 86-87.

The Court of Appeals erred in its adoption of federal common law. This Court should grant certiorari to bring the Third Circuit's jurisprudence into compliance with that of this Court.

II. THE DECISION BELOW PERPETUATES A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS REGARDING WHAT LAW APPLIES TO SUCCESSOR LIABILITY ISSUES UNDER CERCLA.

The question whether to use "federal common law" to resolve successor liability questions under CERCLA has divided the courts of appeals for years. Before this Court's decisions in *O'Melveny*, *Atherton*, and *Bestfoods*, the First and Sixth Circuits had held that state law, not federal common law, must control. *See John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991). In addition to (and often in reliance on) the Third Circuit's decision in *Smith Land*, the Fourth, Eighth, and Ninth Circuits had opted for federal common law, sometimes using it to adopt special pro-Government liability rules for CERCLA cases, such as the notorious "substantial continuity" doctrine (under which the Government needed to prove little more than that the defendant corporation was carrying on the same business as an earlier company). *See United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 487 n.9 (8th Cir. 1992) (dicta); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1262-66 (9th Cir. 1990). Later, the Second Circuit joined this group. *See B.F. Goodrich v. Betkoski*, 99 F.3d 505, 518-520 (2d Cir. 1996), *cert. denied*, 524 U.S. 926 (1998).

This Court's *O'Melveny* trilogy could have been expected to turn the tide, and it certainly was not without effect. In light of this Court's decisions, the First Circuit, in *United States v. Davis*, 261 F.3d 1, 53-54 (1st Cir. 2001), reaffirmed its conclusion that state law must govern, since there is "no evidence that application of state law to the facts of this case would frustrate any federal objective." *See also City Management Corp. v. U.S. Chemical Co.*, 43 F.3d 244 (6th Cir. 1994). The Second and Ninth Circuits, in *State of New York v. National Services Industries, Inc.*, 352 F.3d 682, 686-87 (2d Cir. 2003), and *Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362-64 (9th Cir. 1998), have jettisoned their adoption of the "substantial continuity" doctrine (a rejection that the Third Circuit followed in its decision below, A27). And the Ninth Circuit intimated in *Atchison* that, when faced directly with the question, it will abandon federal common law as well. 159 F.3d at 363-64.

In its decision below, however, the Third Circuit failed to see the light. Despite what should have been viewed as a post-*O'Melveny* trend to the contrary in the circuit case law, the Third Circuit steadfastly declared its continued adherence to a "federal common law" regimen in an opinion seemingly designed to turn the tide yet again. Thus, in Judge Rendell's words, the decision "perpetuates a split among the courts of appeals." A28.

As things now stand, the First and Sixth Circuits apply state law and the Ninth Circuit seems poised to follow suit. The Third, Fourth, and Eighth Circuits are still wedded to federal common law. Though the Second Circuit may be ready to switch to state law, its discussion of the issue in *National Services Industries*, 352 F.3d at 687 n.1, was sufficiently unclear as to cause the district court on remand to express frustration because it did "little to clarify which body of case law" it should apply. *See State of New York v. National Services Industries, Inc.*, 380 F. Supp. 2d 122, 126 (E.D.N.Y. 2005). The frustration is of national

scope and cries out for resolution by this Court. The Court should grant Exide's petition for certiorari to impose harmony on this area of the law that has remained unsettled for more than a decade.

III. THE DECISION BELOW INCORRECTLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING CERCLA LIABILITY THAT SHOULD BE SETTLED BY THIS COURT, AND INJECTED CONFUSION INTO CERCLA JURISPRUDENCE AS IT DID SO.

CERCLA is one of the principal tools crafted by Congress for remediation of the nation's environmental damage. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994); *Exxon Corp. v. Hunt*, 475 U.S. 355, 359-60 (1986). As its primary purposes include imposition of liability for environmental cleanup costs and allocation of financial responsibility through contribution actions, *see Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 161-63 (2004); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996), it is a prodigious source of federal litigation. And as the dollar amounts of remediation judgments often are "substantial," *Key Tronic*, at 814, it is a principal source of concern for businesses seeking to structure their affairs to take potential liabilities into account.

The Third Circuit therefore was correct to recognize the importance of stability and predictability in the selection of legal rules to govern business liabilities under CERCLA. *See* A8, A15. *See also Polius v. Clark Equip. Co.*, 802 F.2d 75, 83 (3d Cir. 1986). But rather than making the law more clear, the Third Circuit's decision has made it more uncertain and confused.

Apart from successor liability, the courts of appeals frequently apply state business law to determine liability in CERCLA cases. For example, they use state law to determine whether a dissolved corporation may be held

liable under CERCLA. *See Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019-20 (7th Cir. 1995) (applying Fed. R. Civ. P. 17(b)); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987) (same). They also apply state law to determine partners' liability under CERCLA. *See Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1500-02 (11th Cir. 1996). While this Court in *Bestfoods*, 524 U.S. at 63 n.9, noted a dispute about the source of law that governs corporate "veil-piercing" under CERCLA, the appellate decisions on that issue since *Bestfoods* have applied state law there too. *See Carter-Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745, 746 n.1 (6th Cir.), *cert. denied*, 533 U.S. 903 (2001); *Browning-Ferris Indus. of Ill., Inc. v. Ter Maat*, 195 F.3d 953, 959 (7th Cir. 1999) (by agreement of parties), *cert. denied*, 529 U.S. 1098 (2000).

Even the Third Circuit has looked to state law on some of these issues. *See, e.g., Aluminum Co. of Amer. v. Beazer East, Inc.*, 124 F.3d 551, 567 (3d Cir. 1997) (dissolved corporation). *See also United States v. USX Corp.*, 68 F.3d 811, 826 n.30 (3d Cir. 1995) (joint venture liability); *cf. also Witco Corp. v. Beekhuis*, 38 F.3d 682, 686-90 (3d Cir. 1994) (liability of decedent's estate). And that court has a well-developed body of law applying state jurisprudence to determine whether a successor company has incurred liability under an indemnity or release agreement. *See Aluminum Co. of Amer.*, 124 F.3d at 565; *Beazer East Inc. v. Mead Corp.*, 34 F.3d 206, 212-15 (3d Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995). *See also Smithkline Beecham Corp. v. Rohm & Haas Co.*, 89 F.3d 154, 158 (3d Cir. 1996); *Fisher Devel. Co. v. Boise Cascade Corp.*, 37 F.3d 104, 109 (3d Cir. 1994).

The Third Circuit did not explain why state law is sufficient to decide the foregoing issues, but insufficient to determine corporate successor liability in this case. It merely emphasized a perceived need for "national uniformity." A16-A17. That need would seem to apply equally in any of these situations, however. The patchwork appli-

cation of state and federal law in these business liability decisions results in neither certainty nor predictability — but instead results in confusion.

Although the Court of Appeals apparently believed that its decision would bring clarity to the law of successor liability, its decision did no such thing. The court vowed to base its rule of federal common law for successor corporations on the law followed by a majority of states. A6-A7, A16-A17. But beyond the *general* framework for successor liability law, the Third Circuit found no consensus in the state decisions on how to deal with such *specific* issues pivotal to this case as whether mixed cash/stock transactions can be *de facto* mergers, or how much stock is sufficient to satisfy a requirement of continuity of ownership. *See* A11-A14 & nn. 5-7. Deeming "the 'majority' standard . . . somewhat unsettled" on these questions, the court instead created a federal common law based on what the critical inquiry "appears to be" according to a handful of cited decisions from a total of only six jurisdictions. *See* A21-A24 & nn. 9-10. The decision thus did not benignly apply a uniform majority state rule to this case; it created a brand new rule of federal law to supplant the absence of any state consensus whatsoever. That *ad hoc* approach to creation of federal law fosters neither uniformity nor predictability.

There is no readily ascertainable standard for determining how a federal court should craft a new federal rule of corporate law for CERCLA cases. This Court has firmly instructed against creation of "a relaxed, CERCLA-specific rule of derivative liability that would banish traditional standards and expectations." *Bestfoods*, 524 U.S. at 70. Yet, it is notable that, in holding in favor of Government recovery, the Third Circuit adopted for this case a decidedly pro-liability *de facto* merger rule that emphasizes continuity of business operations, waters down any requirement for continuity of shareholders, and fails to accord any significance to the seller's retention of tort liabilities and substantial cash with which to pay them. *See* A20-A26. This

new rule looks a great deal like the discredited, CERCLA-specific "substantial continuity" doctrine that the court purported to reject. *See* A20-A27. The decision thus underscores the dangers of special federal-court corporate law-making for CERCLA cases. The Third Circuit's holding thus not only fosters confusion, but it invites pro-Government distortion of corporate law.

Exide's petition should be granted so that this Court may restore certainty to business law and thereby enable businesses purchasing assets and otherwise structuring their affairs to know how their actions may affect their CERCLA liability.

IV. THE DECISION BELOW DISPLACED GOVERNING PENNSYLVANIA LAW WITH A FEDERAL RULE THAT IS AT ODDS WITH STATE POLICY, PRODUCING AN ERRONEOUS RESULT.

The Court of Appeals' error in creating and applying a federal common law made a significant difference here. In selling its assets to General, Price retained liability for its tort claims and received the bulk of the selling price ($4.75 million) in cash; the remaining stock component of that price constituted less than 5% of General's outstanding shares. Whether a sale of corporate assets is a *de facto* merger on facts such as these has not been determined by the Pennsylvania courts, but the policy factors that control that inquiry under Pennsylvania law are inconsistent with those advanced by the Court of Appeals. Although the court below opined in dicta that Pennsylvania law on these issues is consistent with the federal law that it postulated, it cited no Pennsylvania authorities in support of that conclusion and Exide is aware of none. Rather, the relevant guideposts signal that the sale of Price's assets was ***not*** a *de facto* merger under Pennsylvania law.

1. Pennsylvania focuses on stock transfer (rather than cash payment) as an essential element of a *de facto* merger,

and no Pennsylvania court has ever found a *de facto* merger without such a transfer. *See Farris v. Glen Alden Corp.*, 393 Pa. 427, 143 A.2d 25 (1958) (seller paid with majority of buyer's stock); *Carlos R. Leffler, Inc. v. Hutter*, 696 A.2d 157, 167-68 (Pa. Super. 1997) (transfer to new company having same shareholders); *Commonwealth v. Lavelle*, 382 Pa. Super. 356, 555 A.2d 218, *appeal denied*, 524 Pa. 595, 568 A.2d 1246 (1989) (seller had hidden interest in buyer's stock). Numerous federal courts that have examined the issue agree that, under Pennsylvania law, the absence of a stock transfer is fatal to a claim of *de facto* merger, or at least creates a "strong presumption" against its existence. *Berg Chilling Sys. v. Hull Corp.*, 435 F.3d 455, 462, 468-69 (3d Cir. 2006) (Alito, J.).

2. These cases make clear that, rather than being a mere formality, the required stock transfer is a key determinant of whether the selling company has actually merged into its buyer, or merely sold assets to it. The majority below held that "only *some* continuity of ownership is required," A23 (emphasis added), so that even the most minimal stock transfer would be sufficient. *See* 21-A24. But no Pennsylvania decision has ever held that the transfer of less than a controlling interest in the purchasing company is sufficient to create successor liability. Control is a factual issue considered inappropriate for summary judgment. *See Continental Ins. Co. v. Schneider, Inc.*, 810 A.2d 127, 135-36 (Pa. Super. 2002), *aff'd*, 582 Pa. 591, 605 n.11, 873 A.2d 1286, 1294 n.11 (2005). To hold that General's payment of 4.537% of its stock is sufficient in this case would be a significant expansion of Pennsylvania law that is not foreshadowed by any state court precedents.

3. A holistic view of Pennsylvania corporate law makes clear that the Commonwealth would not welcome such an expansion. *See Lavelle*, 382 Pa. Super. at 374, 555 A.2d at 227 (factors considered for successor liability include "the purposes of the provisions of the corporation law said to be applicable"), quoting *Farris*, 393 Pa. at 432,

143 A.2d at 28. In a series of enactments designed to keep competitive with neighboring Delaware, Pennsylvania's Legislature has liberalized allowance of corporate asset sales that do not comply with merger formalities and restricted efforts to challenge such transactions under a *de facto* merger theory. *See* Business Corporation Law (BCL), 15 Pa. C.S. §§ 1105, 1904 (declaring *de facto* merger doctrine "abolished"), 1932; Corp. L. Comm. Comments – 1988 to BCL §§ 1105, 1904, *reprinted at* 15 Pa. C.S.A. §§ 1105, 1904; *MicroSignal Corp. v. MicroSignal Corp.*, 147 Fed. Appx. 227, 232-33 (3d Cir. 2005); *Terry v. Penn Central Corp.*, 668 F.2d 188, 193-94 (3d Cir. 1981). While these enactments do not abrogate the equitable principles of successor liability, *MicroSignal*, at 232 n.9, they inform the framework within which such issues must be decided in Pennsylvania and demand caution.

4. Against this background, the Pennsylvania courts have been careful not to expand the *de facto* merger doctrine. *See, e.g., Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 26, 434 A.2d 106, 111 (1981) (rejecting *de facto* merger expansion to deal with product liability issues, and creating special doctrine limited to product liability actions instead). They have declined to expand traditional successor liability law where alternate avenues of redress are available. *See Hill v. Trailmobile, Inc.*, 412 Pa. Super. 320, 328-31, 603 A.2d 602, 607-08 (1992) (no expansion where party has alternative sources of recovery against other parties). *See also Lackawaxen Water & Sewer Co. v. Pennsylvania Pub. Util. Comm.*, 85 Pa. Commw. 377, 381, 481 A.2d 1386, 1388 (1984) (transferor must "no longer ha[ve] substantial assets with which to meet its contractual or tort obligations").

Here, Price retained its tort liabilities rather then making them subject to General's indemnity, and was paid the vast bulk of the sales price in cash with which it could satisfy those obligations. Price remained in existence until 1967, and its sole shareholder could have been pursued thereafter. No Pennsylvania court ever has held that there

is a *de facto* merger where there has been such a retention of liabilities by, and such a large payment of cash (rather than stock) to, the seller. Nothing in Pennsylvania law warrants such an expansion of successor liability law by a federal court in this case, and nothing in CERCLA authorizes Pennsylvania law's displacement. This Court should grant certiorari so that it may restore deference to the governing Pennsylvania corporate law.

CONCLUSION

Pennsylvania law did not permit entry of summary judgment against Exide. Rather than applying that law, the Court of Appeals displaced it with federal common law, even though this Court had instructed that it should not do so. This Court should grant the petition for a writ of certiorari, vacate the Court of Appeals' decision, and remand for application of Pennsylvania state law to the successor liability issue.

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Dated: March 31, 2006.

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OPINION OF THE COURT OF APPEALS
(423 F.3d 294)

United States Court of Appeals for the Third Circuit

No. 03-3515

UNITED STATES OF AMERICA
v.
GENERAL BATTERY CORPORATION, INC.;
EXIDE CORPORATION,

Exide Corporation, Appellant

Argued January 26, 2005
Before: SCIRICA, *Chief Judge*,
RENDELL and FISHER, *Circuit Judges*

(Filed September 6, 2005)

OPINION OF THE COURT

SCIRICA, *Chief Judge*.

[*296] This appeal addresses successor liability under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*, for environmental response costs incurred by the United States at a lead-contaminated Superfund site. The District Court granted summary

judgment in favor of the United States on a "de facto merger" theory of successor liability. We will affirm.

I.

The matter begins with a now defunct company, Price Battery Corporation. From the 1930s through 1966, Price Battery manufactured lead acid batteries at a plant in Hamburg, Pennsylvania. During that time, it arranged for the disposal of waste materials -- including spent battery casings -- at locations in and around Hamburg. In 1992, the United States Environmental Protection Agency discovered two of the disposal sites, and upon further investigation found three more. The properties contained elevated levels of lead. After testing and monitoring, the EPA concluded remedial action was necessary to protect human health. The United States has since incurred response costs of several million dollars associated with the removal of contaminated soil and the installation of a remedial "cap" at the properties.

Seeking to identify a responsible party under CERCLA, *see* 42 U.S.C. § 9607(a)(1)-(4), EPA determined that Price Battery, through its disposal of battery casings, was responsible for the lead contamination. Price Battery, however, was long since out of business, having been acquired for cash and stock by General Battery Corporation in 1966. General Battery, in turn, merged with Exide Corporation in 2000. The United States filed this action against Exide, alleging it was responsible for Price Battery's CERCLA liability as a successor in interest.

The parties agree that as a consequence of the 2000 merger, Exide is General Battery's successor. The disputed issue is whether General Battery, by virtue of its 1966 acquisition of Price Battery, was a successor to Price Battery. The relevant aspects of the Price/General transaction are as follows. On February 11, 1966, General Battery, a diversified public company, entered into an

agreement with Price Battery, a smaller, privately-held battery manufacturing firm. Price Battery was owned by a single shareholder, William F. Price Sr., who sold General Battery most of his company's assets in exchange for $ 2.95 million in cash, 100,000 shares of General Battery stock, and a seat on General's board of directors.[1] At the time, 100,000 General Battery shares were valued at approximately $ 1 million and represented 4.537% of General's outstanding equity. William Price Sr.'s resulting stake in General Battery was comparable to that of the company's cofounders, W.A. Shea and H.J. Nozensky, who in 1966 remained on General's **[*297]** board and held 5.12% and 4.44% of its outstanding equity, respectively.

Under the agreement, General Battery purchased Price Battery's equipment, materials, intellectual property and inventory. It also assumed Price Battery's contractual obligations, including employment contracts, and assumed all other liabilities appearing on Price Battery's balance sheet. General Battery indemnified Price Battery for claims, other than future tort claims, arising from Price Battery's operations, and agreed to continue the employment of three senior Price Battery officers -- the president, the executive vice president, and the vice president of manufacturing.

After the transaction, General Battery continued manufacturing batteries at the Hamburg plant. Price

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1. The only Price Battery asset nominally excluded from the transaction was its real property, including its manufacturing plant. Price Battery sold its real property and the building to a nonprofit development organization for $ 1.8 million. The development organization, in turn, leased the facility back to General Battery until 1978, when the deed was transferred to General for $ 1.00. Taking this into account, Price Sr. received $ 4.75 million cash and 100,000 shares of General Battery stock for the Price Battery enterprise.

Battery's plant superintendent and middle managers retained their positions, as did the union employees, office personnel and sales force. General Battery produced the same batteries that Price Battery had produced and honored Price Battery's contracts with existing customers and vendors. Price Battery, meanwhile, was required under the agreement to immediately change its name to Price Investment Company and to retain $ 150,000 in cash pending completion of an audit. The agreement contemplated that following the audit and any corresponding adjustment in the purchase price, Price Investment would liquidate on or before December 31, 1966. From the transaction closing in February of 1966 until filing for a certificate of corporate dissolution in February of 1967, Price Investment Company had no operations.

On cross-motions for summary judgment, the District Court held the Price/General transaction constituted a common law "de facto merger." In the District Court's view, the continuity of location, assets, products, operations, management, employees, contracts, and shareholders between Price Battery and General Battery, and the subsequent liquidation and dissolution of Price Battery, establish General Battery (and now Exide) as Price Battery's successors in interest under CERCLA. *United States v. Exide Corp.*, 2002 U.S. Dist. LEXIS 3303 (E.D. Pa. Feb. 27, 2002). Following the District Court's entry of summary judgment, the parties stipulated to past CERCLA response costs at the Hamburg site in the amount of $ 6,500,000. Exide retained the right to file this appeal as to liability.

II.

The District Court had jurisdiction under CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. Our summary judgment standard of review is plenary. *In re Mushroom*

Transp. Co., 382 F.3d 325, 335 (3d Cir. 2004) (drawing all reasonable inferences in favor of the non-moving party).

III.

We return, once again, to the difficult area of indirect liability under CERCLA.[2] CERCLA is a "sweeping" federal remedial statute, enacted in 1980 to ensure that "*everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of **[*298]** cleanup." *United States v. Bestfoods*, 524 U.S. 51, 56 n.1, 141 L. Ed. 2d 43, 118 S. Ct. 1876 (1998) (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989) (plurality opinion of Brennan, J.)) (emphasis in original). "As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Id.* at 55 (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 814, 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994)).

CERCLA is not, however, "a model of legislative draftsmanship," *Exxon Corp. v. Hunt*, 475 U.S. 355, 363, 89 L. Ed. 2d 364, 106 S. Ct. 1103 (1986) – and successor liability is one of its puzzles. Although the statute fails to address the issue expressly, it is now settled that CERCLA incorporates common law principles of indirect corporate liability, including successor liability. *See* 42 U.S.C. §

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2. *See, e.g., Alcoa v. Beazer E.*, 124 F.3d 551 (3d Cir. 1997) (shareholder, successor and indemnitor liability); *SmithKline Beecham Corp. v. Rohm & Haas Co.*, 89 F.3d 154 (3d Cir. 1996) (indemnitor and successor liability); *United States v. USX Corp.*, 68 F.3d 811 (3d Cir. 1995) (shareholder and officer liability); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993) (parent-subsidiary liability); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988) (corporate successor liability).

9601(21) (including "corporations" among the "persons" covered by CERCLA); 1 U.S.C. § 5 (providing, as a rule of interpretation, that "the word 'company' or 'association', when used in reference to a corporation, shall be deemed to embrace the words 'successors and assigns of such company or association'"); *Bestfoods*, 524 U.S. at 63-64 (holding CERCLA incorporates common law of parent/subsidiary veil-piercing); *Smith Land*, 851 F.2d at 92 (holding CERCLA imposes successor liability).[3]

The threshold issue on appeal is whether to apply a uniform federal rule of successor liability, or whether to apply the law of a particular state. The second issue is whether Exide is liable as a successor.

A.

We have previously addressed and decided the threshold issue. In *Smith Land*, we held that CERCLA successor liability is a matter of uniform federal law, as derived from "the general doctrine of successor liability in operation in most states." 851 F.2d at 92 (3d Cir. 1988). Likewise, we held in *Lansford-Coaldale* that "given the federal interest in uniformity in the application of CERCLA, it is federal common law, and not state law, which governs" matters of indirect CERCLA liability. 4

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3. The courts of appeals that have addressed the issue are unanimous in recognizing successor liability under CERCLA. *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001); *N.Y. v. Nat'l Servs. Indus.*, 352 F.3d 682 (2d Cir. 2003); *Smith Land*, 851 F.2d at 92 (3d Cir. 1988); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992); *Anspec v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991); *N. Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 649 (7th Cir. 1998); *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 486 (8th Cir. 1992); *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 364 (9th Cir. 1997).

F.3d at 1225 (3d Cir. 1993) (discussing parent/subsidiary veil-piercing).

In the course of holding that CERCLA authorizes successor liability, we reasoned that "Congress expected the courts to develop a federal common law to supplement the statute," that "[i]n resolving the successor liability issues here, the district court must consider national uniformity," and that "[t]he general doctrine of successor liability in operation in most states should guide the court's decision rather than the excessively narrow statutes which might apply in only a few states." *Smith Land*, 851 F.2d at 91-92. This reasoning is unambiguous, essential to the *Smith Land* disposition, and controlling on the issue before us. *Smith Land* expressly rejected the position that a *particular* state's successor liability law applies under CERCLA. *Lansford-Coaldale*, another **[*299]** indirect liability case under CERCLA, is to the same effect. 4 F.3d at 1225. The Supreme Court has neither addressed nor disturbed these holdings. *See Bestfoods*, 524 U.S. at 64 n.9 (noting, but not resolving, disagreement over "whether, in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law").

Relying principally on *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 129 L. Ed. 2d 67, 114 S. Ct. 2048 (1994), a case decided under the federal banking statutes, and *Davis*, 261 F.3d at 54 (1st Cir. 2001), a case applying state successor liability law under CERCLA, Exide invites us to overrule *Smith Land*.

In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 59 L. Ed. 2d 711, 99 S. Ct. 1448 (1979), the Supreme Court addressed the propriety of applying state law under an ambiguous or incomplete federal statute. The Court emphasized that, "[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependant upon a variety of considerations always

relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'" *Id.* at 728 (quoting *United States v. Standard Oil*, 332 U.S. 301, 310, 91 L. Ed. 2067, 67 S. Ct. 1604 (1947)). The issue in *Kimbell Foods* was whether, absent an express statutory directive, a uniform federal rule of lien priorities was necessary under certain federal loan programs. *Id.* at 718. Employing a three-factor analysis, the Court answered this question in the negative, holding state law governed the priority of the liens. *Kimbell Foods* considered (1) whether the federal program, by its very nature, required uniformity; (2) whether application of state law would frustrate specific objectives of the federal program; and (3) whether application of uniform federal law would disrupt existing commercial relationships predicated on state law. *Id. at* 728-29.

Emphasizing the second *Kimbell Foods* factor – a conflict with an identifiable federal interest – the Supreme Court in *O'Melveny* cautioned against the unwarranted displacement of state law, holding that state rules of decision generally fill interstitial gaps in federal statutes. 512 U.S. at 87. The displacement of state law is particularly disfavored in the area of corporate law, because business decisions typically proceed in reliance on the applicable state standards. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 105, 114 L. Ed. 2d 152, 111 S. Ct. 1711 (1991). State corporation law generally should be integrated into the federal statutory regime, unless there exists "a significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87; *see also Kamen*, 500 U.S. at 107; *Kimbell Foods*, 440 U.S. at 728; *see generally* Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). The principal question here, then, is whether CERCLA requires a uniform federal standard of corporate successor liability.

As noted, *Smith Land* and *Lansford-Coaldale* expressly held that CERCLA requires uniform federal standards of

successor and veil-piercing liability, respectively. Neither case has been overruled. *O'Melveny*, a case brought under a state law cause of action (as opposed to a federal liability statute), 512 U.S. at 83, dealing with the preemptive force of the federal *banking* statutes, *id.* at 86, did not overrule our CERCLA-specific holdings in *Smith Land* and *Lansford-Coaldale*. *O'Melveny* involved claims brought by the Federal Deposit Insurance **[*300]** Corporation (FDIC), as the receiver of a federally insured bank, under California tort law. The FDIC argued, notwithstanding its reliance on a state law cause of action, that uniform federal liability standards should preempt the California rules of decision. The Supreme Court disagreed, holding the relevant federal statutes neither authorized nor required the creation of a preemptive body of federal common law in cases arising under state law causes of action. *Id.* at 89. *Atherton v. FDIC*, another decision cited by Exide Corporation in which the Court cautioned against the unwarranted "creation" of federal common law, also involved the preemptive scope of the federal banking laws. 519 U.S. 213, 218, 136 L. Ed. 2d 656, 117 S. Ct. 666 (1997).

Smith Land and *Lansford-Coaldale*, in contrast, held that uniform standards of indirect corporate liability are necessary under CERCLA, an environmental liability statute enforced under its own federal cause of action. *O'Melveny* and *Atherton* neither addressed the CERCLA-specific reasoning of *Smith Land* and *Lansford-Coaldale* nor overruled their CERCLA-specific holdings.

Bestfoods, a case decided after *O'Melveny* and *Atherton*, is the only Supreme Court decision touching on the CERCLA question at issue. But the Court there explicitly declined to resolve the circuit split on whether CERCLA borrows a particular state's law of indirect corporate liability. *Bestfoods*, 524 U.S. at 64 n.9. *Bestfoods* neither cited *O'Melveny* nor otherwise suggested that uniform CERCLA successor liability standards were inappropriate.

If anything, *Bestfoods* cuts in favor of a uniform federal standard. *Bestfoods* applied "fundamental" and "hornbook" principles of indirect corporate liability, not the law of any particular state. 524 U.S. at 61-62. The court of appeals in *Bestfoods* had applied Michigan law. *United States v. Cordova Chem. Co.*, 113 F.3d 572, 580 (6th Cir. 1997) (en banc). But the Supreme Court declined to apply Michigan law and instead looked to the general "hornbook" rule of veil-piercing. The Court's reliance on the general standard is a different matter than borrowing the law of a *particular* state. Applying a particular state's law requires a state-by-state interpretation of the federal liability statute — a result, in the case of successor liability under CERCLA, that we believe conflicts with the statutory objectives. *See* discussion *infra*.

A uniform federal standard is also consistent with recent Supreme Court decisions in which gaps in federal liability statutes were filled not with the law of a particular state, but with general common law principles. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448, 155 L. Ed. 2d 615, 123 S. Ct. 1673 (2003) (looking to the general common law definition of "servant" to define the term "employee" under the ADA); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998) (relying on "the general common law of agency, rather than on the law of any particular State," in defining the term "agent" under Title VII) (citation omitted). Just as the ADA and Title VII require uniform federal definitions of the terms "employee" and "agent," respectively, CERCLA requires a uniform federal definition of "successor corporation." As the Court explained in *Burlington*, "[t]he resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction," not the free-wheeling creation of federal common law. 524 U.S. at 755.

For these reasons, we believe that *Smith Land* and *Lansford-Coaldale* have **[*301]** not been undermined by

recent Supreme Court decisions and remain circuit law. *See* Third Circuit Internal Operating Procedure 9.1 ("[T]he holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.").

Moreover, we believe *Smith Land* is consistent with CERCLA's objectives. CERCLA is a federal liability statute, applicable nationwide to those responsible for hazardous-waste contamination. Liability under the statute is a matter of federal law. 42 U.S.C. § 9613(f)(1) (CERCLA contribution actions "shall be governed by Federal law"); *Kimbell Foods*, 440 U.S. at 726 ("This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs.").

It is true that successor tort liability, including successor environmental liability, rests at the intersection of tort and corporate law – both areas largely regulated by the states. But it does not necessarily follow that CERCLA's statutory scheme is served by borrowing a particular state's successor liability law as the federal rule of decision. The choice of law framework governing successor liability remains unsettled.[4] And although the

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4. *Compare In re Asbestos Litig. (Bell)*, 517 A.2d 697, 699 (Del. Super. Ct. 1986) (characterizing successor liability as a corporate/contract doctrine), *with Savage Arms Inc. v. West. Auto Supply Co.*, 18 P.3d 49, 53 (Alaska 2001) (collecting cases, noting that "state courts have split on the question," and characterizing successor products liability as a tort doctrine); *see also Ruiz v. Blentech Corp.*, 89 F.3d 320, 322 (7th Cir. 1996) (describing a question of successor liability choice of law as "rather mystifying"); *SmithKline Beecham Corp. v. Rohm & Haas Co.*, 1995 U.S. Dist. LEXIS 3361, at *12-26 (E.D. Pa. Mar. 17, 1995) (wrestling with choice of law for CERCLA successor liability).

general doctrine of successor liability is "largely uniform" under state law, *Atchison*, 159 F.3d at 363 (9th Cir. 1997) (citation omitted), this uniformity is less apparent when the general standards are applied in specific cases.[5] Beneath a veneer of uniformity, the "entire issue of successor liability . . . is dreadfully tangled, reflecting the difficulty of striking the right balance between the competing interests at stake." *EEOC v. Vucitech*, 842 F.2d 936, 944 (7th Cir. 1988).

In *Atchison*, the Court of Appeals for the Ninth Circuit, in considered dictum, expressed doubt that a uniform federal rule of successor liability is necessary under **[*302]** CERCLA. 159 F.3d at 364. The court

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5. For example, some states emphasize "continuity of ownership" as a key element of successor liability. *Cargo Partner AG v. Albatrans Inc.*, 352 F.3d 41, 47 (2d Cir. 2003) (New York law). Others do not. *Woodrick v. Jack J. Burke Real Estate, Inc.*, 306 N.J. Super. 61, 703 A.2d 306, 313-14 (N.J. Super. Ct. App. Div. 1997) (finding de facto merger absent continuity of ownership). Some states apply unique successorship rules in products liability and environmental cases. *Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106, 111-12 (Pa. Super. Ct. 1981); *Dep't of Transp. v. PSC Res., Inc.*, 175 N.J. Super. 447, 419 A.2d 1151 (N.J. Super. Ct. Law Div. 1980). Others do not. *Bielagus v. EMRE of N.H., Corp.*, 149 N.H. 635, 826 A.2d 559 (N.H. 2003). In some states, the governing rules are difficult to ascertain. *Compare Hart v. Bruno Mach. Corp.*, 250 A.D.2d 58, 679 N.Y.S.2d 740 (N.Y. App. Div. 1998) (applying product line theory of successor liability), *with City of N.Y. v. Charles Pfizer & Co.*, 260 A.D.2d 174, 688 N.Y.S.2d 23 (N.Y. App. Div. 1999) (rejecting same theory). Even jurisdictions in broad agreement on the appropriate legal standards may apply them differently. *SmithKline Beecham*, 1995 U.S. Dist. LEXIS 3361, at *23-24 (E.D. Pa. Mar. 17, 1995) (noting differences between New Jersey and Pennsylvania application of common de facto merger elements). Reconciling these holdings poses some difficulty. *See Cargo Partner AG v. Albatrans, Inc.*, 207 F. Supp. 2d 86, 93-114 (S.D.N.Y. 2001).

reasoned that "[i]f state law varied widely on the issue of successor liability, perhaps the need for a uniform federal rule would be more apparent." *Id.* at 363. But we respectfully disagree with *Atchison*'s premise. State law does vary substantially on the issue of successor liability, and its unpredictability counsels in favor of CERCLA uniformity.

The successor liability issues raised in this case are illustrative. Whether a mixed cash/stock acquisition triggers successor liability under the de facto merger doctrine does not command uniform treatment among the states.[6] Whether successor liability attaches to a transaction where the seller receives a "small percentage" of the buyer's outstanding equity is also unsettled.[7] For example,

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6. *Compare Ladenburg Thalmann & Co. v. Tim's Amusements, Inc.*, 275 A.D.2d 243, 248, 712 N.Y.S.2d 526 (N.Y. App. Div. 2001) (finding continuity of ownership in assets-for-promissory note transaction), *and Fenderson v. Athey Prods. Corp.*, 220 Ill. App. 3d 832, 581 N.E.2d 288, 292, 163 Ill. Dec. 337 (Ill. Ap. Ct. 1991) (Illinois law) (no requirement "that all or even most of the purchase price" be paid in stock), *with Nova Ribbon Prods. v. Lincoln Ribbon*, 1995 U.S. Dist. LEXIS 4322, at *20 (E.D. Pa. Mar. 30, 1995) (Pennsylvania law) (holding de facto merger liability turns on whether transaction is "primarily" for stock). Even within New Jersey, the continuity of ownership standard appears unsettled in mixed cash/stock transactions. *Compare Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 356 A.2d 458, 461 (N.J. Super. Ct. Law Div. 1976) (imposing successor liability where stock comprises less than half of purchase price), *with McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 264 A.2d 98, 104 (N.J. Super. Ct. Law Div. 1970) (no continuity of ownership in mixed cash/stock transaction).

7. *Compare Cargill, Inc. v. Beaver Coal & Oil Co., Inc.*, 424 Mass. 356, 361, 676 N.E.2d 815 (1997) (Massachusetts law) (finding continuity of ownership where seller receives 12.5% stake in acquiring company), *and Glynwed, Inc. v. Plastimatic Inc.*, 869 F.

New Jersey corporations may be held responsible for successor environmental liability from which New York corporations may be exempt. *Compare PSC*, 175 N.J. Super. 447, 419 A.2d 1151 (N.J. Super. Ct. Law Div. 1980) (applying expansive theory of successor liability to environmental torts), *with Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 451 N.E.2d 195, 198, 464 N.Y.S.2d 437 (N.Y. 1983) (adhering to traditional concepts of successor liability). We doubt Congress intended to incorporate such variations under a comprehensive federal liability statute. *See* 42 U.S.C. § 9613(f)(1) (CERCLA contribution actions "shall be governed by Federal law"); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43, 104 L. Ed. 2d 29, 109 S. Ct. 1597 (1989) ("federal statutes are generally intended to have uniform nationwide application").

A more uniform and predictable federal liability standard corresponds with specific CERCLA objectives by encouraging settlements and facilitating a more liquid market in corporate and "brownfield" assets. *See* 42 U.S.C. § 9622 (encouraging CERCLA settlements "in order to expedite effective remedial actions and minimize litigation"); § 9607(r) (encouraging transfer and redevelopment of contaminated property under CERCLA's so-called "Brownfield Amendments")[8]; *cf.*

Supp. 265, 277 (D.N.J. 1994) (New Jersey law) ("continuity of ownership, not uniformity, is the test"), *with Savage Arms*, 18 P.3d at 58 (Alaska 2001) (noting that percentage of shares owned is an "important fact"), *and Kaleta v. Whittaker Corp.*, 221 Ill. App. 3d 705, 583 N.E.2d 567, 571, 164 Ill. Dec. 651 (Ill. App. Ct. 1991) (finding no continuity of ownership where seller received a "de minimis" .00037% stake in buyer).

8. In 2001, Congress amended CERCLA with the Brownfields Revitalization Act in order to spur the cleanup, transfer and redevelopment of contaminated land. Pub. L. No. 107-118, 115 Stat. 2356 (the "Brownfields Amendments"). Among other goals,

Polius **[*303]** *v. Clark Equip. Co.*, 802 F.2d 75, 83 (3d Cir. 1986) ("Unforseeable alterations in successor liability principles complicate transfers and necessarily increases transaction costs. Major economic decisions, critical to society, are best made in a climate of relative certainty and reasonable predictability.") (citation omitted).

Smith Land's application of the "majority" standard fosters CERCLA predictability. It also accords respect to existing commercial relationships predicated on the majority state law, *cf. Kimbell Foods*, 440 U.S. at 728-29, while ensuring that responsible parties, including successor corporations, contribute their fair share to the cleanup of hazardous waste under the federal program. *Accord B.F. Goodrich v. Betkoski*, 112 F.3d 88 (2d Cir. 1997) (applying uniform federal standard); *Carolina Transformer*, 978 F.2d at 837 (4th Cir. 1992) (same); *Mex. Feed & Seed*, 980 F.2d at 487 n.9 (8th Cir. 1992) (dicta); *but see Davis*, 261 F.3d at 54 (1st Cir. 2001) (applying state law); *Atchison*, 159 F.3d at 361-64 (9th Cir. 1997) (dicta); *Anspec*, 922 F.2d at 1250 (6th Cir. 1991) (Kennedy, J., concurring).

Davis, the most recent court of appeals decision applying state law, held that CERCLA incorporates state successor liability rules unless the particular state law is "hostile to the federal interests animating CERCLA." 261 F.3d at 54 (1st Cir. 2001). *Davis* followed *Atchison*, where the Court of Appeals for the Ninth Circuit concluded that

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the Brownfields Amendments encourage the acquisition and redevelopment of Superfund sites by according bona fide asset purchasers a defense to CERCLA liability. 42 U.S.C. § 9607(r)(1). The principal goal of the Amendments is to balance the interest in cost recovery under CERCLA's liability provisions with the economic interest in a liquid market for "brownfield" assets. Consistent with this purpose, a predictable test for successor liability lowers transaction costs and encourages brownfield acquisitions.

borrowing state law is consistent with CERCLA, because "[i]t is unrealistic to think that a state would alter general corporate law principles to become a particularly hospitable haven for polluters." 159 F.3d at 364 (9th Cir. 1997). As a general matter, we agree it is unlikely that states would attempt to immunize their corporations from CERCLA liability. *See generally* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210 (1992).

But neither *Atchison*, nor *Davis*, nor the concurring and dissenting opinion, address the conflict between CERCLA's objectives and borrowing unpredictable state successorship law. We believe that incorporating variable and uncertain state successor liability standards would increase significantly CERCLA litigation and transaction costs – in conflict with the statutory interests embodied in 42 U.S.C. § 9622, which aims to encourage early settlements, and § 9607(r), which aims to facilitate a liquid market in brownfield assets. *See In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 206 (3d Cir. 2003) (emphasizing CERCLA's policy of minimizing litigation costs); *United States v. DiBiase*, 45 F.3d 541, 545-46 (1st Cir. 1995) (explaining CERCLA's policy of reducing "transaction costs"); *see generally United States v. Charter Int'l Oil Co.*, 83 F.3d 510, 520 (1st Cir. 1996) (surveying empirical research on the "huge resources going into the transactions costs of CERCLA litigation" and observing that reducing these costs was a primary objective of the 1986 amendments to the statute).

To summarize, the Supreme Court has neither overruled nor directly undermined *Smith Land*. Furthermore, a uniform federal standard is appropriate under *Kimbell Foods* and *O'Melveny*: (1) the nature of **[*304]** the federal program, a comprehensive federal liability statute, counsels in favor of national uniformity; (2) a uniform successor liability standard is necessary to

advance CERCLA's remedial objectives and to facilitate a fluid market in corporate and brownfield assets; and (3) uniform application of the majority state standard accords proper respect to commercial relationships predicated on the majority state law. Therefore, we will apply "the general doctrine of successor liability in operation in most states." *Smith Land*, 851 F.2d at 92.

The concurring and dissenting opinion contends that we reach an "unnecessary" holding on this issue, emphasizing that Pennsylvania law mirrors the majority "de facto merger" standard and would yield the same result. But *Smith Land* and *Lansford-Coaldale* preclude exclusive reliance on the law of a particular state. For the reasons stated, we believe these decisions remain controlling. More fundamentally, because CERCLA's goal of minimizing litigation and transaction costs is ill-served by a case-by-case approach to the question of successor liability choice-of-law, we need not inquire whether Pennsylvania law conflicts with or mirrors the majority successor liability doctrine before holding that a federal rule applies.

We add a final note on nomenclature and its pitfalls. Part of the difficulty in this area may stem from imprecise use of the term "federal common law." In its strictest sense, federal common law represents the judicial "creation" of law under a generalized statutory mandate. *Atherton*, 519 U.S. at 218. Examples include the federal labor laws, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957), and ERISA, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989). In recent years the Supreme Court has emphasized that the cases requiring this brand of federal common law are "few and restricted." *O'Melveny*, 512 U.S. at 87 (citation omitted). To view every ambiguous federal statute as authorizing an expansive body of "federal common law" would be an invitation to

federal courts to eviscerate both the *Erie* doctrine and the concept of dual sovereignty it embodies.

But the "creation" of federal common law must be distinguished from statutory interpretation. *See Atherton*, 519 U.S. at 218. Ambiguous federal statutes generally do not authorize the creation of a new (and preemptive) body of federal law. *Id.* But this principle does not require that every federal statutory gap be filled by way of state-by-state interpretation. "In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 101 S. Ct. 1571 (1981); *see also Atherton*, 519 U.S. at 218 (distinguishing the "creation" of federal common law from "interpretation of a federal statute or a properly promulgated administrative rule").

In the case of federal liability statutes enforced under a federal cause of action, the law is generally intended to have uniform nationwide application. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989) ("federal statutes are generally intended to have uniform nationwide application"); *Jansen v. Packaging Corp.*, 123 F.3d 490, 507 (7th Cir. 1997) (en banc) (Posner, J., concurring and dissenting). The most recent Supreme Court cases, both decided after *O'Melveny* and **[*305]** *Atherton*, followed this approach. *Clackamas*, 538 U.S. at 448 (2003); *Burlington*, 524 U.S. at 754-55 (1998). These decisions affirm the view that uniform interpretation of an undefined term in a federal liability statute "is not free-wheeling common-law rulemaking," but rather "filling a statutory gap, a standard office of interpretation." *Jansen*, 123 F.3d at 507. Accordingly, supplying a uniform definition of "successor corporation" under CERCLA is a matter of interpreting the federal

statute. *See* 42 U.S.C. § 9601(21) (including "corporations" among the "persons" covered by CERCLA); 1 U.S.C. § 5 (providing, as a rule of interpretation, that "the word 'company' or 'association', when used in reference to a corporation, shall be deemed to embrace the words 'successors and assigns of such company or association'").

B.

Turning to the appropriate liability standard, we are mindful of *Bestfoods*, where the Supreme Court held that CERCLA incorporates, but does not expand upon, "fundamental" common law principles of indirect corporate liability. 524 U.S. at 62-64. The general rule of corporate successorship accepted in most states is non-liability for acquiring corporations, with the following exceptions:

> The purchaser may be liable where: (1) it assumes liability; (2) the transaction amounts to a consolidation or merger; (3) the transaction is fraudulent and intended to provide an escape from liability; or (4) the purchasing corporation is a mere continuation of the selling company.

Polius, 802 F.2d at 78 (3d Cir. 1986) (stating general rule); 15 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 7122, at 227-48 (perm. ed., rev. vol. 1999) (collecting cases).

This case involves the "de facto merger" exception, which has four elements under the majority standard. It applies where:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.

(2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.

(3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

(4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, 1457-58 (11th Cir. 1985) (stating the "majority" de facto merger standard); *Keller v. Clark Equip. Co.*, 715 F.2d 1280, 1291 (8th Cir. 1983) (same); 15 Fletcher, *supra*, § 7124.20, at 302 (stating majority rule and collecting cases). The majority standard generally tracks the inquiry under Pennsylvania law. *See SmithKline Beecham*, 89 F.3d at 162 n.6.

Based on the record, we agree with the District Court that the Price/General transaction constituted a de facto merger.

(1)

Under prong one — continuity of enterprise — General Battery purchased all of **[*306]** Price Battery's equipment and inventory, assumed tenancy of its manufacturing plant, and continued its production of batteries. The plant superintendent and middle managers retained their positions, as did the union employees, office personnel and sales force. General Battery continued the employment of three senior Price Battery executives — the presi-

dent, executive vice president, and vice president of manufacturing – who, among other duties, remained active in supervising the Hamburg plant. General Battery was supplied by Price Battery's vendors, served Price Battery's customers, and manufactured essentially the same battery products. In every operational respect – from management and employees to location and assets to products and general business operations – General Battery continued the Price Battery enterprise. We agree with the District Court's exemplary analysis under this element.

(2)

De facto merger prong two – continuity of shareholders – presents a closer question. Prior to the transaction, William Price Sr. was the sole shareholder of Price Battery. He received from General Battery $ 2.95 million in cash, 100,000 shares of General Battery stock, and a seat on General Battery's board of directors in exchange for the Price Battery enterprise. At the time, 100,000 shares of General Battery stock were valued at approximately $ 1 million and represented 4.537% of its outstanding equity. Price Sr.'s resulting stake in General Battery was comparable to that of the company's two co-founders, who owned 5.12% and 4.44% of its stock, respectively.

The parties dispute whether this mixed cash/stock transaction evidences the requisite continuity of ownership. Exide contends continuity of ownership is lacking where the seller receives "primarily" cash and a "small percentage" of the buyer's outstanding equity. The United States responds that "under the de facto merger exception, there is no requirement that the seller acquire majority control or any other specific percentage of the buyer, only that there be some continuity of shareholder ownership."

The standard applied in most states recognizes continuity of ownership where "the shareholders of the seller corporation . . . become a constituent part of the purchasing corporation." 15 Fletcher, *supra*, § 7124.20, at 302 (stating general rule); *Keller*, 715 F.2d at 1291 (8th Cir. 1983) (same); *see also SmithKline Beecham*, 89 F.3d at 162 n.6 (3d Cir. 1996) (Pennsylvania law).

This standard, which requires continuity rather than identity of ownership, corresponds with the general purposes of the successor liability doctrine. *See Cargo Partner AG*, 352 F.3d at 47 (2d Cir. 2003) (New York law) (holding continuity of ownership "is the essence of" a de facto merger); *Nat. Gypsum Co. v. Cont. Brands Corp.*, 895 F. Supp. 328, 337-38 (D. Mass. 1995) (collecting cases). The overriding goal of successor liability, and of the de facto merger inquiry, is to balance "the interest in preventing tortfeasors from externalizing the costs of their misconduct" with "the interest in a fluid market in corporate assets." *Vucitech*, 842 F.2d at 944 (7th Cir. 1988).

The continuity of shareholders element is designed to identify situations where the shareholders of a seller corporation retain some ownership interest in their assets after cleansing those assets of liability. *See generally* Marie T. Reilly, *Making Sense of Successor Liability*, 31 Hofstra L. Rev. 745 (2003); Mark J. Roe, *Mergers, Acquisitions and Tort: A Comment on the Problem of Successor Corporation Liability*, **[*307]** 70 Va. L. Rev. 1559 (1984). Successor liability in this context accords a legal remedy to injured third-parties, preventing the externalization of the seller's costs of doing business, and deterring transactions designed to impose the costs of misconduct on third-parties. *See SmithKline Beecham*, 89 F.3d at 164 (discussing remedial purposes of de facto merger doctrine). Identifying these transactions is the objective of the continuity of ownership requirement. *Nat'l Gypsum*, 895 F. Supp. at 337 (D. Mass. 1995); *Cargo Partner AG*, 352 F.3d at 47 (2d Cir. 2003).

But the cases do not, as Exide contends, distinguish sharply between transactions "primarily" for cash versus stock, or between large versus small percentage interests in the ongoing enterprise. Rather, only some continuity of ownership is required. There is no generally accepted common law distinction between primarily stock mergers, on the one hand, and primarily cash transactions, on the other.[9] Nor does successor liability necessarily turn on the seller's percentage interest in the buyer.[10] Although the "majority" standard is somewhat unsettled at this frontier of successor liability, the critical "continuity of ownership"

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9. *See, e.g., Wilson*, 140 N.J. Super. 476, 356 A.2d 458 (N.J. Super. Ct. Law Div. 1976) (imposing successor liability where stock comprised less than half of purchase price); *Atlas Tool Co. v. Comm'r*, 614 F.2d 860, 871 (3d Cir. 1980) (New Jersey law) ("Although there was no stock transfer here, and only cash was involved, there was clearly a continuation of stockholder interest."); *Bud Antle, Inc. v. E. Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985) ("At the very least, there must be some sort of continuation of the stockholders' ownership interests."); *Ametek, Inc. v. Pioneer Salt & Chem. Co.*, 709 F. Supp. 556, 560 (E.D. Pa. 1988) (holding a de facto merger is possible where the seller retains a "contingent stake . . . in its former business"); *Fenderson*, 581 N.E.2d at 292 (Ill. App. Ct. 1991) (no requirement "that all or even most of the purchase price" be paid in stock).

10. *See, e.g., Cargill*, 424 Mass. 356, 676 N.E.2d 815 (1997) (Massachusetts law) (finding continuity of ownership where seller received 12.5% stake in acquiring company); *United States v. Keystone Sanitation Co.*, 1996 U.S. Dist. LEXIS 13651, at *23-25 (M.D. Pa. Aug. 22, 1996) (federal law) (finding continuity of ownership where seller received less than 1% stake in buyer); *T.H.S. Northstar Assocs. v. W.R. Grace & Co.*, 840 F. Supp. 676 (D. Minn. 1993) (Minnesota law) (finding continuity where seller's owners received 2.27% of buyer's stock); *Glynwed*, 869 F. Supp. at 277 (D.N.J. 1994) (New Jersey law) ("continuity of ownership, not uniformity, is the test").

inquiry appears to be whether the owners retained some ongoing interest in their assets.

Continuity of ownership is established under CERCLA where the owners of the predecessor enterprise become a "constituent part" of the successor by retaining some ongoing interest in their assets. *See* 15 Fletcher, *supra*, § 7124.20, at 302 (stating majority rule and collecting cases). Under this standard, William Price Sr. became a "constituent part" of General Battery when he received 100,000 shares of General Battery stock and a seat on General's board in exchange for the Price Battery enterprise.

(3)

Under the third de facto merger element, it is apparent that Price Battery ceased operations, liquidated, and dissolved as soon as legally and practically possible. The Price/General agreement, which closed in February of 1966, required Price Battery to discontinue operations immediately and change its name to Price Investment Company. Price Battery did so. The agreement also required that Price Investment remain in existence from February through December of 1966, maintaining cash reserves pending completion **[*308]** of an audit and other contingencies. After this waiting period and following any adjustments in the purchase price, the agreement contemplated that Price Battery would liquidate and dissolve. Specifically, the contract provided "for the complete liquidation of Price and the distribution of all of its assets within the twelve month period beginning [on February 8, 1966]." Price Investment filed for corporate dissolution on February 8, 1967, and formally dissolved approximately six months later.

The contractual requirement that Price Battery immediately change its name, cease operations, and subsequently liquidate and dissolve, is more characteristic

of a merger than an asset purchase. As recognized under the de facto merger doctrine, an essential characteristic of a merger is that one corporation survives while another ceases to exist. *Knapp v. N. Am. Rockwell Corp.*, 506 F.2d 361, 367 (3d Cir. 1974) (Pennsylvania law). Here, the Price/General agreement expressly required the liquidation and dissolution of Price Battery as a condition of the transaction, suggesting a merger rather than the mere sale of Price Battery's assets.

Exide emphasizes Price Investment's failure to dissolve immediately, contending that for over a year "the two companies remained completely independent of each other in management and operations." But the more salient fact is that Price Battery immediately ceased ordinary business operations. Within one week of the closing date, Price Battery recast itself as Price Investment Company – a corporate shell that only held cash reserves pending final settlement with General Battery. Price Investment had no operations.

The *Knapp* case presented similar facts. There we held the seller company dissolved as soon as legally and practically possible. 506 F.2d at 369 (3d Cir. 1974) (Pennsylvania law). The seller corporation in *Knapp* had "technically continued to exist until its dissolution approximately 18 months after the consummation of the transaction," *id.* at 364, but during that period it "had no substance" and "could not undertake any active operations." *Id.* at 369. As in *Knapp*, "barren continuation" of the seller company does not bar application of the de facto merger doctrine. *Id. at 368.* We agree with the District Court that Price Battery ceased operations, liquidated and dissolved as soon as legally and practically possible.

(4)

Finally, under prong four – assumption of obligations ordinarily necessary for the uninterrupted continuation of normal business operations – the Price/General agreement expressly provided that General Battery would assume Price Battery's contractual obligations and all other obligations appearing on Price Battery's balance sheet. This unambiguous assumption of obligations, including employment, sales and vendor contracts, satisfies the fourth de facto merger element.

C.

In sum, the de facto merger criteria are satisfied. Citing *Polius*, Exide responds with the overarching objection that "imposition of successor liability on a purchasing company long after the transfer of assets defeats the legitimate expectations the parties held during negotiation and sale." 802 F.2d at 83. But even if we accept this statement as a general proposition, the response here is twofold. First, application of the traditional de facto merger standard, which generally tracks the Pennsylvania rule, can hardly come as a surprise to sophisticated corporate parties who transacted under Pennsylvania law. Second, CERCLA by its **[*309]** very nature upsets party expectations. Congress nevertheless viewed retroactive CERCLA liability as necessary to ensure that those "responsible for any damage, environmental harm, or injury from chemical poisons may be tagged with the cost of their actions." *Bestfoods*, 524 U.S. at 56 (quoting S. Rep. No. 96-848, 13 (1980)) (internal punctuation marks omitted).

We hold that General Battery and Exide, as successors to Price Battery, are responsible for the CERCLA liability of their predecessor.

D.

We briefly address the District Court's alternative holding that Exide is liable under CERCLA on a "substantial continuity" theory of successor liability.[11] Prior to *Bestfoods*, several courts adopted the "substantial continuity" test as a basis for CERCLA successor liability. *See New York v. Nat'l Servs. Indus.*, 352 F.3d 682, 687-88 (2d Cir. 2003) (collecting cases). "Substantial continuity" eliminates certain elements of the de facto merger analysis – including the continuity of ownership requirement – and in effect creates a more expansive rule of liability than is accepted in most states. *Id.* at 687 (noting substantial continuity is applied "by only a handful of states"). Recently, however, several courts of appeals have rejected the doctrine as inconsistent with *Bestfoods*, 524 U.S. 51, 141 L. Ed. 2d 43, 118 S. Ct. 1876 (1998).[12] We agree. *Bestfoods* held that CERCLA does not, *sub silentio*, abrogate fundamental common law principles of indirect corporate liability. 524 U.S. at 63-64. Accordingly, "substantial continuity" is untenable as a basis for successor liability under CERCLA.

IV. Conclusion

We will affirm the judgment of the District Court.

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11. The government does not seek affirmance on the basis of "substantial continuity" and does not cite any relevant law on the issue.

12. *See Nat'l Servs. Indus.*, 352 F.3d at 687 (2d Cir. 2003) (holding "the substantial continuity doctrine is not part of general federal common law and, following *Bestfoods*, should not be used to determine whether a corporation takes on CERCLA liability as the result of an asset purchase"); *Davis*, 261 F.3d at 53 (1st Cir. 2001) (same); *Atchison*, 159 F.3d 358 (9th Cir. 1998) (same).

Concurring in part and dissenting in part

RENDELL, Circuit Judge.

I agree with the majority's conclusion that the fact pattern presented was a *de facto* merger such that successor liability for purposes of CERCLA exists and therefore concur in its ultimate ruling. However, I part company with the majority regarding its decision to announce that the issue of successor liability in this context is controlled by federal common law. This determination is unnecessary to the resolution of the issues before us and runs counter to recent Supreme Court pronouncements which both call into question the concept of federal common law and explicitly state that only in the most limited of circumstances should we look beyond applicable state law. Moreover, two other courts of appeals – the First and the Ninth – have considered the precise issue before us and our opinion perpetuates a split among the courts of appeals. Those courts have opined that the Supreme Court's recent directives cast serious doubt on the advisability of creating federal common law to dictate the contours of successor liability under CERCLA.[13] The **[*310]** majority, however, embraces the application of federal common law, relying instead on the outdated notion of promoting uniformity.

Over the course of the last decade, and since we decided *Smith Land & Improv. Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988) and *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993), the Supreme Court has issued several opinions denouncing the creation of federal common law where state law would

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13. Interestingly, as we note below, one of the courts – the Ninth Circuit – had previously followed our lead in *Smith Land*, but more recently reevaluated its view in light of later Supreme Court precedent concluding, as we should, that creating federal common law should be a last resort.

otherwise apply. Principally, in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 129 L. Ed. 2d 67, 114 S. Ct. 2048 (1994), the Court rejected the notion that a federal common law rule regarding the imputation of corporate officer knowledge to a corporation should be applied in an action against the Federal Deposit Insurance Corporation ("FDIC"). The Court stated:

> The first of these contentions need not detain us long, as it is so plainly wrong. "There is no federal general common law, and . . . the remote possibility that corporations may go into federal receivership is no conceivable basis for adopting a special federal common-law rule divesting states of authority over the entire law of imputation."

Id. at 83 (internal citation omitted) (citing *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33-34, 1 L. Ed. 2d 93, 77 S. Ct. 119 (1956)).

The *O'Melveny* Court went on to note that, with regard to "the central question of displacement of [state] law" in favor of a rule federal in nature:

> [W]e of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.
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> . . . . As we proceed to explain, even assuming the inapplicability of FIRREA [Financial Institutions Reform, Recovery, and Enforcement Act of 1989] this is not one of those cases in which

judicial creation of a special federal rule would be justified.

> Such cases are, as we have said in the past, "few and restricted," *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963), *limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law." Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 16 L. Ed. 2d 369, 86 S. Ct. 1301 (1966). Our cases *uniformly require the existence of such a conflict* as a precondition for recognition of a federal rule of decision. *Kimbell Foods*, 440 U.S. at 728. Not only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict. *What is fatal to respondent's position in the present case is that it has identified no significant conflict with an identifiable federal policy or interest.*

O'Melveny & Myers, 512 U.S. at 85, 87-88 (some internal citations omitted) (emphasis added). While *O'Melveny* did not involve CERCLA, nonetheless, the pronouncement of the Court regarding displacement of state law makes crystal clear that matters left unaddressed by a comprehensive federal statutory scheme are presumably left subject to the **[*311]** disposition provided by state law[14] –

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14. The issue before us is not the meaning of a term contained in CERCLA, as was the case in many of the cases cited by the majority. Rather, the issue before us is whether state or federal law regarding successor liability will apply when the courts are fashioning remedies under CERCLA. No one has contended we are construing a word or phrase in the statute. If we are, we should request further briefing on this issue as it has not been addressed by the parties.

CERCLA now counts a "corporation" as a "person" for

there must exist a conflict, identifiable and specific, with an important federal policy before we consider resorting to federal common law.

Three years after deciding *O'Melveny*, the Supreme Court again commented on the concept of "federal common law," in the case of *Atherton v. FDIC*, 519 U.S. 213, 136 L. Ed. 2d 656, 117 S. Ct. 666 (1997). In *Atherton*, the Court again emphasized the "precondition," *id.* at 218, that a conflict exist to warrant the conception of a federal rule;

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purposes of liability, *see* 42 U.S.C. § 9601(21), but the statute itself clearly does not reference or provide for successor liability. Therefore, we are confronted with a matter in an otherwise detailed federal statutory scheme, not a mere need to attach meaning to a term of art employed but not defined by Congress, as was the case in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448, 155 L. Ed. 2d 615, 123 S. Ct. 1673 (2003) (looking "to the common law to fill gaps in statutory *text*, particularly when *an undefined term* has a settled meaning at common law," in this case to define "employee under the ADA) (emphasis added); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 755, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (relying on general common law of agency to define term "agent" under Title VII where state court decisions "determinations of employer liability under state law rely in large part on federal court decisions"); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47, n.22, 104 L. Ed. 2d 29, 109 S. Ct. 1597 (1989) (using federal common law to define "domicile" under the Indian Child Welfare Act and noting that Congress had, in other parts of the legislation, stated explicitly where it wanted terms "defined by reference to tribal law or custom and to state law"); and *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989) (employing federal common law to define "work made for hire" under provisions of the Copyright Act of 1976, a statute intended to broadly preempt state statutory and common-law copyright regulation). These cases would be informative if we too were focusing on the meaning given to a term in a federal statute, but that is not our focus.

under the facts of the case before it, the Court stated that its initial inquiry must concern whether the application of *the relevant state law* standard of care to banks would conflict with, and thereby significantly undermine, an identifiable federal policy or interest:

> States normally look to the State of a business' incorporation for the law that provides the relevant corporate governance general standard of care. And by analogy, it has been argued, courts should look to federal law to find the standard of care governing officers and directors of federally chartered banks.
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> To find a justification for federal common law in this argument, however, is to substitute analogy or formal symmetry for the controlling legal requirement, namely, the existence of a need to create federal common law arising out of a significant conflict or threat to a federal interest. *O'Melveny*, 512 U.S. at 85, 87.
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> * * *
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> In sum, we can find no significant conflict with, or threat to, a federal interest. The federal need is far weaker than was present in what the Court has called the "few and restricted' instances," *Milwaukee v. Illinois*, 451 U.S. 304, 313, 68 L. Ed. 2d 114, 101 S. Ct. 1784 (1981), in which this Court has created a federal common law.

Atherton, 519 U.S. at 224-25. The Court then detailed such "few **[*312]** and restricted" cases, which I list in the margin.[15] Again, the Court's focus was on the presence of

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15. As enumerated by the Court in *Atherton*: *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 82 L. Ed. 1202,

a significant conflict. And, to discern whether a conflict is present, we are not to evaluate the jurisprudential landscape of all fifty states; rather, "federal courts should incorporate state law into federal common law unless *the particular state law in question* is inconsistent with the policies underlying the federal statute." *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 111 S. Ct. 1711, 1722, 114 L. Ed. 2d 152 (1991) (emphasis added).

Most recently, in *United States v. Bestfoods*, the Court was called upon to consider whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable under CERCLA as an operator of a polluting facility owned or operated by the subsidiary. 524 U.S. 51, 55, 141 L. Ed. 2d 43, 118 S. Ct. 1876 (1998). The Court answered in the negative, "unless the corporate veil may be pierced." *Id.* In so concluding, the Court expounded upon certain general principles of corporate law – for example, that

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58 S. Ct. 803 (1938) (controversy between two States regarding apportionment of streamwater); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988) (Federal Government contractors and civil liability of federal officials); *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 305, 91 L. Ed. 2067, 67 S. Ct. 1604 (1947) (relationship between Federal Government and members of its armed forces); *Howard v. Lyons*, 360 U.S. 593, 597, 3 L. Ed. 2d 1454, 79 S. Ct. 1331 (1959) (liability of federal officers in the course of official duty); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964) (relationships with other countries). *See also Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 68 L. Ed. 2d 500, 101 S. Ct. 2061(1981) ("Absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases").

parents are not liable for the acts of their subsidiaries, *id.* at 62, along with the "equally fundamental principle of corporate law" that a corporate veil may be pierced where the corporate form was misused, *id.* Significantly, the Court explained:

> Nothing in CERCLA purports to rewrite this well-settled rule, either. CERCLA is thus like many another congressional enactment in giving no indication "that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute," *Burks v. Lasker*, 441 U.S. 471, 478, 60 L. Ed. 2d 404, 99 S. Ct. 1831 (1979), and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that "in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law," *United States v. Texas*, 507 U.S. 529, 534, 123 L. Ed. 2d 245, 113 S. Ct. 1631 (1993) (internal quotation marks omitted). The Court of Appeals was accordingly correct in holding that when (but only when) the corporate veil may be pierced, may a parent corporation be charged with derivative CERCLA liability for its subsidiary's actions.

Id. at 63-64 (footnotes omitted).

As noted by the majority, the *Bestfoods* Court declined to reach the precise issue before us, noting a "disagreement" as to whether "courts should borrow state law, or instead apply a federal common law of **[*313]** veil piercing," 524 U.S. at 64, n.9, but sidestepping any conclusion: "Since none of the parties challenges the Sixth Circuit's holding that [certain companies] incurred no derivative liability, the question is not presented in this case,

and we do not address it further," *id.* The majority protests that the Court did not declare the use of federal common law inappropriate at this juncture or cite to *O'Melveny*. But the Court clearly did not need to, or choose to, reach the issue. We should infer nothing from its silence.

I find more significant the *Bestfoods* Court's affirmative discussion of "norms of corporate behavior," which it viewed as constituting crucial reference points, along with the reliability of bedrock principles of corporate law. *See, e.g.*, 524 U.S. at 70 n.13 & 71. I cannot help but conclude that reference to the "norms" bolsters the view that existing state corporate law principles should control, and we need not invent federal law, or deem them "federal", in order to further CERCLA's regulatory scheme. The Court's discussion of "congressional silence" concerning these "bedrock" corporate principles, which it describes as "audible," supports this view. 524 U.S. at 62. With respect to the silence wrought by Congress' failure to address, in the statute, the claim at issue in *Bestfoods*, notably, the Court stated that "CERCLA is thus like many another congressional enactment in giving no indication 'that the entire corpus of state corporation law is to be replaced simply because the plaintiff's cause of action is based upon our federal statute.'" *Bestfoods*, 524 U.S. at 63 (quoting *Burks v. Lasker*, 441 U.S. 471, 478, 60 L. Ed. 2d 404, 99 S. Ct. 1831 (1979)). Indeed, the *Bestfoods* Court chided the district court in that case for having "treated CERCLA as though it displaced or fundamentally altered common law standards of limited liability" because "such a rule does not arise from congressional silence, and CERCLA's silence is dispositive." 524 U.S. at 70. Finally, it bears noting that the Supreme Court affirmed the court of appeals' determination applying Michigan law that a parent may be held liable only where the corporate veil may be pierced. *See United States v. Cordova Chem. Co.*, 113 F.3d 572, 580 (6th Cir. 1997).

After reading these three recent Supreme Court opinions, I am left with the clear impression that the notion of resorting to a federal rule of successor liability here, mandating it as controlling in our Circuit without regard to state law, would not be endorsed by the Supreme Court. The overarching theme is that state law should not be displaced unless the particular state law at issue conflicts with an important federal policy. Noticeably absent is any reference to the majority's guiding theme – that of the need for uniformity. And, as I discuss more fully below, uniformity for uniformity's sake is not such a policy.

The courts of appeals that have addressed this issue agree that the Supreme Court's recent decisions discussed above have moved toward reliance on state law, and away from the creation of federal common law, unless a conflict exists. In *Atchison, T. & S.F. Ry. v. Brown & Bryant*, 159 F.3d 358 (9th Cir. 1997), the Court of Appeals for the Ninth Circuit considered whether the Supreme Court's pronouncements on this issue in *O'Melveny* and *Atherton* (*Bestfoods* had not yet been decided) were clear enough to cause it to abandon its own previous determination in *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260 (9th Cir. 1990) (adopting Third Circuit's rationale in *Smith Land*) that the parameters of successor liability under CERCLA should be fashioned by federal common law in order to promote national **[*314]** uniformity. The *Atchison* court concluded that although the *Atherton* and *O'Melveny* opinions implicated FIRREA, and not CERCLA, the underlying analysis was nonetheless applicable and persuasive. 159 F.3d at 362. Thus, in concluding that the promotion of national uniformity does not justify application of federal common law to CERCLA, the Court effectively rejected its previous determination in *Louisiana-Pacific* along with that opinion's underlying rationale – our own opinion in *Smith Land*.

Initially, the *Atchison* Court correctly noted that "simply because a federal statute is involved does not always

mean that federal courts should fashion a uniform federal rule." 159 F.3d at 362 (citation omitted). "Frequently, state rules of decision will furnish an appropriate and convenient measure of the governing federal law." *Id.* The subsequent discussion merits repeating in full:

> In *Louisiana-Pacific*, we agreed with the Third Circuit that CERCLA's "'meager legislative history available indicates that Congress expected the courts to develop a federal common law to supplement the statute.'" 909 F.2d at 1263 (quoting *Smith Land*, 851 F.2d 86 at 91). This legislative history consists of a discussion in Congress that common law should govern the issue of joint and several liability under CERCLA. *Louisiana-Pacific* recognized that Congress did not address the particular issue of successor liability under CERCLA.
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> *O'Melveny* tells us that when dealing with a "comprehensive and detailed" federal statutory regulation, a court should instead presume that matters left unaddressed in such a scheme are subject to state law. "Congress acts . . . against the background of the total *corpus juris* of the states . . . ." *Atherton*, 117 S. Ct. at 670 (alteration in original). The formation of corporations and the dissolution and continuing liability of corporations are traditional areas of state law. As CERCLA lacks any clear directive that federal courts develop standards for successor liability, we turn to the *Kimbell Foods* test, as clarified by *O'Melveny* and *Atherton*.
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> * * *
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> Although *Louisiana-Pacific* refers to the "need for national uniformity" as a reason for developing federal rules for successor liability, *Atherton*

notes that "to invoke the concept of 'uniformity' . . . is not to prove its need." 117 S. Ct. at 671; *see also O'Melveny*, 114 S. Ct. at 2055 (recognizing how generic and "lightly invoked" is the need for uniformity). Although often invoked in this context, there has been no real explanation of the need for uniformity in the particular area of successor liability — especially since state law will in many other instances determine whom the EPA may or may not look to for compensation. If state law varied widely on the issue of successor liability, perhaps the need for a uniform federal rule would be more apparent. This is not the case, however, as "the law in the fifty states on corporate dissolution and successor liability is largely uniform." *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1249 (6th Cir. 1991) (Kennedy, J., concurring) (holding that state law determines successor liability under CERCLA). The argued "need" for uniformity thus stems not from disarray among the various states, but from the alleged need for a more expansive view of successor liability than state law currently provides — in other words, the notion that state law on this issue is inadequate for CERCLA's purposes.

[*315] But *O'Melveny* and *Atherton* also speak to this argument. Before a court can recognize a federal rule of decision, there must be a "'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny*, 114 S. Ct. at 2055 (quoting *Wallis*, 384 U.S. 63 at 68). Indeed, such a conflict is a "precondition" to fashioning federal common law rules. *Atherton, 117 S. Ct. at 670.* The Court's recent cases clarify that to demonstrate such a conflict, more than speculation is required — there must be a "specific, concrete federal policy or interest

> that is compromised" by the application of state law. *O'Melveny*, 114 S. Ct. at 2055. We therefore doubt that the concern noted in *Louisiana-Pacific* is sufficient grounds for developing a federal rule of decision.

Atchison, 159 F.3d at 362-64 (certain internal citations and footnotes omitted).[16] The *Atchison* Court concluded that it would not adopt the "substantial continuation" exception (which would have expanded federal common law liability). It then reasoned that because the same result would flow in the case before it under either state law or federal common law, it need not decide whether state or federal law governs successor liability under CERCLA. *Id.* at 364. Despite bypassing the question we now consider, it is abundantly clear that the Ninth Circuit, were its hand forced, would follow the recent directives of the Supreme Court and hold that state law should govern successor liability under CERCLA.

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16. The majority excerpts a line of dicta from *Atchison* in which the Court muses that if "state law varied widely on the issue of successor liability, perhaps the need for a uniform federal rule would be more apparent." (Maj. Op. at 17.) However, as the more fully excerpted passage above shows, the Court goes on to explain that this need not preoccupy it because, first and foremost, the Supreme Court has made clear that there must exist a significant conflict between some federal policy or interest and the use of state law.

    In disagreeing with the *Atchison* Court on this point, and by citing what it views as a varied set of state laws concerning successor liability as the jumping off point for application of a federal rule, the majority leapfrogs over the critical inquiry — whether there exists a conflict between Pennsylvania law and an important federal policy or interest. Lack of uniformity itself does not satisfy the requirement that a conflict exist — only *after* a conflict has been identified does the Supreme Court direct us to evaluate the need for a uniform rule.

Even more recently, and with the benefit of the *Bestfoods* opinion, the Court of Appeals for the First Circuit, considering displacement of Connecticut state law to determine successor liability under CERCLA, did just that:

> We have concluded that the majority rule is to apply state law "so long as it is not hostile to the federal interests animating CERCLA," and have applied Massachusetts contracts law to determine an issue of successor liability. *John S. Boyd Co., Inc. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir. 1993). Recent Supreme Court precedent confirms that *Boyd's* approach is correct. The Court applied state corporation law in a recent CERCLA case involving the potential liability of a parent corporation for its subsidiary and left little room for the creation of a federal rule of liability under the statute. *See United States v. Bestfoods*, 524 U.S. 51, 63, 141 L. Ed. 2d 43, 118 S. Ct. 1876 (1998) ("CERCLA is . . . like many another congressional enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute.") (internal quotation marks omitted). The Court's statements **[*316]** in *Bestfoods* and *O'Melveny* demonstrate that to justify the creation of a federal rule, "there must be a specific, concrete federal policy or interest that is compromised by the application of state law." *Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 363-64 (9th Cir. 1998) (internal quotation marks omitted). We see no evidence that application of state law to the facts of this case would frustrate any federal objective. Connecticut's "mere continuation" test thus is the correct test for determining successor liability for the hazardous waste disposed.

United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001).

As recognized by the *Atchison* and *Davis* courts, the Supreme Court has repeatedly emphasized that a specific and identifiable conflict must be present before we should invoke and apply a federal rule of decision. Here, no such conflict exists. Absent evidence that application of Pennsylvania state law, not the hypothetical application of the law of 49 other states, *does* frustrate CERCLA's purpose – holding liable parties responsible for the costs associated with the clean up of hazardous waste sites – and in the face of recent Supreme Court opinions discouraging the creation of a federal rule of decision, it is readily apparent that resort to any law other than Pennsylvania's is unnecessary and uncalled for.

I subscribe to and seek to reiterate a number of the majority's threshold observations, which it appears to note but then discard: namely, that the Supreme Court has "cautioned against the unwarranted displacement of state law" (Maj. Op. at 11) (citing *O'Melveny*, 512 U.S. at 87); additionally, that "[i]ncorporation of state law is particularly favored in the area of corporate law, because business decisions proceed in reliance on the applicable state standards" (*Id.*) (citing *Kamen*, 111 S. Ct. at 1722); and, finally, that absent some significant conflict arises between a federal policy interest and the use of state law, "state corporation law generally should be integrated into the federal statutory regime." (*Id.*) (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 59 L. Ed. 2d 711, 99 S. Ct. 1448 (1979)) (other citations omitted). But, it is not clear to me why, in the face of these guiding principles, the majority then frames the issue before us simply as "whether CERCLA requires a uniform federal standard of corporate successor liability." (Maj. Op. at 11.)

The majority's determination that application of federal common law is warranted here hinges on our previous terse treatment of the issue in *Smith Land &*

Improv. Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988) and *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993), cases in which the Court advanced only one animating rationale for adopting the "general doctrine of successor liability in operation in most states," 851 F.2d at 92 – the need for a uniform and predictable body of law. We did so in a few conclusory sentences, without any meaningful discussion. Intervening Supreme Court precedent makes clear, however, that this rationale is no longer, if it ever was, paramount when evaluating whether we are confronted with "one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89, 129 L. Ed. 2d 67, 114 S. Ct. 2048 (1994). To the extent *SmithLand* and *Lansford-Coaldale* command us to ignore in our analysis longstanding, ingrained principles of state corporate law in favor of "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity," *id.* at 88, **[*317]** those decisions should be reevaluated. *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 161 (3d Cir. 2004) ("We recognize that we may reevaluate a precedent in light of intervening authority even without en banc consideration."); *United States v. Adams*, 252 F.3d 276, 286 (3d Cir. 2001) ("Although a panel of this court is bound by, and lacks authority to overrule, a published decision of a prior panel, a panel may reevaluate a precedent in light of intervening authority.") (internal quotations omitted). We must reevaluate the exalted position that we previously afforded "uniformity" in light of the Supreme Court's direction that we are to employ a different mode of analysis.[17]

The majority asserts that resort to federal common law is necessary because state laws concerning successor

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17. To the extent that it could be argued that adopting this position requires us to convene the Court en banc and overrule prior opinions, then I would urge that we do so.

liability are not uniform and thus, without fashioning a federal rule of decision, predictability will be lacking. To say that the need for uniformity is the articulated federal policy supplying the rationale for creating federal common law is to put the analytic rabbit in the hat, so to speak. If uniform application is indeed the goal, resort would never be had to state law assuming some variation as among the different laws. Uniformity cannot be, and has never been said to be, the single animating principle. While it is a laudable goal, it is not one that has served as the basis on which the Supreme Court, or any other court of appeals to have addressed the issue, has rejected the application of state law. Rather, as discussed above and made clear in *O'Melveny* and *Atherton*, those courts that have considered rejecting the application of a particular state law in favor of a federal scheme have done so only when the state law in question *clearly conflicted* with an important federal policy to be advanced. *See, e.g., Kamen*, 500 U.S. at 98; *Boyle*, 487 U.S. at 504; *Texas Industries, Inc.*, 451 U.S. at 641; *Wallis*, 384 U.S. at 68; *Sabbatino*, 376 U.S. at 425; *Wheeldin*, 373 U.S. at 651; *Lyons*, 360 U.S. at 596; *Standard Oil Co. of Cal.*, 332 U.S. at 305. *See also Redwing Carriers, Inc., v. Saraland Apartments*, 94 F.3d 1489, 1501-02 (11th Cir. 1996) (holding that state law should be adopted as the federal standard for determining whether a limited partner may be held accountable for the CERCLA liability of the partnership). These cases also make clear that it is the second factor of the *Kimbell Foods* test[18] which should

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18. The *Kimbell Foods* test details three considerations relevant to the determination of whether federal common law or state law should provide the rule of decision: 1) whether the nature of the federal program requires national uniformity; 2) whether the application of state law would frustrate specific objectives of the federal program; and 3) whether the application of federal law would disrupt commercial relationships predicated on state law. *See Adams v. Madison Realty & Dev., Inc.*, 937 F.2d 845, 856 (3d Cir. 1991) (citing *Kimbell Foods*, 440 U.S. at 728-29).

receive paramount consideration. The Supreme Court in *O'Melveny* and *Atherton* cite to the *Kimbell Foods* test in direct support of the precept that "when courts decide to fashion rules of federal common law, 'the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.' Indeed, such a 'conflict' is normally a 'precondition.'" *Atherton*, 519 U.S. at 218 (quoting *O'Melveny*, 512 U.S. at 87. and citing *Kimbell Foods*, 440 U.S. at 728). **[*318]** The Court in *Atherton* cites to *Kimbell Foods* an additional time, where it explains, "To invoke the concept of 'uniformity,' [] is not to prove its need." 519 U.S. at 220 (citing *Kimbell Foods*, 440 U.S. at 730 (rejecting "generalized pleas for uniformity")). Certainly, neither opinion relies, as the majority seems to do, on *Kimbell Foods'* other espoused consideration – whether the federal program requires uniformity, or come close to elevating this factor to the point of deeming it a "precondition," as has the Court with respect to the presence of a significant conflict.[19]

Clearly, the required conflict does not exist here; application of Pennsylvania law produces the desired result. Therefore, we need not abandon Pennsylvania law, nor should we label the rule applied today by the majority "federal." Accordingly, I respectfully dissent from the reasoning contained in the majority's opinion but concur in the resulting affirmance of the District Court's order.

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19. *Bestfoods* does not even cite to *Kimbell Foods*.

DISTRICT COURT OPINION
ON MOTIONS FOR SUMMARY JUDGMENT
(2002 U.S. Dist. LEXIS 3303)

United States District Court
for the Eastern District of Pennsylvania

United States of America, Plaintiff,
v.
Exide Corporation, Defendant.

Civil Action No. 00-cv-3057

February 27, 2002, Decided

MEMORANDUM

BUCKWALTER, J.

[*1] Plaintiff, the United States of America (the "United States") brings this action against Defendant Exide Corporation ("Exide") alleging that under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, Exide is liable for costs incurred by the United States in response to the release of hazardous substances at the Hamburg Lead Superfund Site in Berks County, Pennsylvania. The United States also seeks a declaratory judgment under **[*2]** § 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), that Exide is liable for any future response costs or damages. Presently before the Court are the parties' cross motions for summary judgment pursuant to Rule 56(c). For the reasons stated below, the United States' motion is granted.

I. FACTS

From the 1940s until approximately February 11, 1966, Price Battery Corporation ("Price") operated a lead-acid battery manufacturing plant in Hamburg, Pennsylvania ("the Hamburg Plant" or "the plant"). As a matter of course, Price reused the lead plates from old batteries in the process of creating new batteries. Until the early 1960s, Price employees brought used batteries back to the Hamburg Plant, split them open, and re-used the lead plates in the plant's smelter. The junk battery casings, each often containing a paste of lead residue, were not re-used. Price employees dumped these battery casings at various locations in and around Hamburg. Price also made these battery casings available for members of the community to pick up for themselves and use as landfill. During this time until 1961, Price also contracted with Blue Mountain Coal Company ("Blue Mountain") **[*3]** to crush the junk battery casings with a bulldozer after they were dumped in and around Hamburg, and to dump slag (waste leftover from the smelting operations) at the same locations. At least one Blue Mountain truck driver saw pieces of lead in the slag.

Beginning in the early 1960s, Price altered its method of acquiring the lead plates for re-use. Instead of breaking the junk batteries itself, Price contracted with Brown's Battery ("Brown's") to do so. Brown's used a shear that sliced off the tops of the batteries in order to remove the lead plates for re-use. After the tops were removed, Brown's shipped not only the lead plates, but the casing battery tops (which also contained re-usable quantities of lead) back to Price. Price crushed the battery tops, removed the lead pieces, and then gave away the remaining battery casing pieces as landfill. Price then re-used both the lead plates and the lead pieces removed from the battery tops in its smelter.

On February 11, 1966, General Battery Corporation ("General") entered into a Purchase Agreement (the "Agreement") with Price. The Agreement called for General to purchase all of Price's assets, except its cash on hand at closing and **[*4]** the Hamburg Plant and attendant land, which were sold to the Greater Berks County Development Fund and leased by General. Price also transferred to General all its rights under its existing contracts, including contracts pertaining to employment and employee benefits, insurance, customers, purchasing, material supply, as well as the battery breaking contract with Brown's. In exchange, Price received approximately $ 2.9 million in cash, 100,000 shares of General's common stock, and General's promise to "pay, perform and discharge the debts, obligations, contracts and [certain] liabilities" of Price. Specifically, General agreed to assume all liabilities reflected on its balance sheet as of the day of purchase, and agreed to "indemnify and save harmless Price" regarding "all other liabilities of any kind or character ... unless unknown to Price ... arising out of the operation of the business of Price or its subsidiaries in the normal course prior to January 1, 1966." Under the Agreement, Price agreed to change its name to Price Investment Company or another name as approved by General. In addition, the Agreement was also conditioned upon General's employment of numerous Price executives.

[*5] General continued the system for re-using the lead in junked batteries that had been in place since the early 1960s: it provided the batteries to Brown's for breaking and received back both the lead plates and the sheared battery tops. It crushed the battery tops and removed the lead pieces. Finally, it re-used these lead pieces, as well as the returned lead plates, in its smelter. Significantly, however, the parties disagree on what happened to the remaining pieces of the battery tops after General's purchase. The United States contends that General continued to give away the remaining pieces for

landfill as Price had done. Exide, however, contends that General burned them for fuel and did not give them away. In any case, General continued this basic system to re-use lead from old batteries until the smelter closed in the early 1970s. In 2000, General merged with Exide.

In August 1993, the U.S. Department of Environmental Protection (EPA) performed a removal assessment of two sites near Hamburg – referred to as "the Fieldhouse" and "the Playground" – where Price dumped broken battery casings and where it now observed such casings. Levels of lead well above allowable amounts were **[*6]** found at both sites. EPA performed a removal action from August 1994 to August 1995 at the Fieldhouse and the Playground. In connection with the removal action, EPA discovered three additional sites at which Price had dumped broken battery casings and that now contain levels of lead above EPA's removal action level. On September 28, 2000, EPA Region III approved the re-start of the removal action to remedy soil erosion due to heightened concern about these hazardous substances in residential areas where children play. As of this date, EPA is still acting at these five sites and is investigating further sites in and around Hamburg where battery casings battery casings may have been dumped.

II. LEGAL STANDARD

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). "Only disputes **[*7]** over facts that might affect the outcome of

the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962). The nonmoving party, however, cannot "rely merely upon bare assertions, conclusory allegations or suspicions" to support its claim. *Fireman's Ins. Co. v. Du Fresne*, 676 F.2d 965, 969 (3d Cir. 1982). To the contrary, a mere scintilla of evidence in support of the nonmoving party's position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. *Liberty Lobby*, 477 U.S. at 252. Therefore, it **[*8]** is plain that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In such a situation, "the moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 323 (quoting Fed. R. Civ. P. 56(c)).

III. DISCUSSION

A. Liability Under § 107(a) of CERCLA

In order to establish a defendant's liability under § 107(a) of CERCLA, a plaintiff must establish four elements: (1) that hazardous substances were disposed of at a "facility"; (2) that there has been a "release" or "threatened release" of "hazardous substances" from the facility into the environment; (3) that the release or threatened release has required or will require the United States to expend "response **[*9]** costs"; and (4) that the defendant falls within one of four categories of responsible parties set out under the statute. 42 U.S.C. 9607(a). The relevant category of responsible parties includes "any person who by contract, agreement, or otherwise arranged for disposal ... of hazardous substances owned or possessed by such person." 42 U.S.C. 9607(a)(3).[1] If these requirements are met, responsible parties are liable regardless of their intent. *United States v. CDMG Realty Co.*, 96 F.3d 706, 712 (3d Cir. 1996). *See also United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258-259 (3d Cir. 1992).

[*10] Exide does not dispute that the United States satisfies the first three elements of § 107(a). To satisfy the fourth element, in its motion the United States contends that: (1) Exide is a responsible party because it is the successor to the liabilities of General through its merger with General in 2000; (2) General is a responsible party both indirectly, because it was the successor to the

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1. A corporation is a "person" under CERCLA. 42 U.S.C. § 9601(21). Corporations are liable under § 107(a) if their waste containing hazardous substances is transported to a site and the same hazardous substances are later sound at the site. *See O'Neil v. Picillo*, 682 F. Supp. 706, 725 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *United States v. Wade*, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983).

liabilities of Price through its purchase of Price in February 1966, and directly, because after the purchase it continued to give away pieces of the battery tops as landfill; and (3) Price is directly a responsible party since it arranged for disposal of hazardous substances later found in the five sites in and around Hamburg.

Exide does not contest the first and third links in this chain of liability. However, Exide contends that summary judgment in favor of the United States is inappropriate because, viewing the evidence in the light most favorable to it, the United States has not established that General is either successor to the liabilities of Price or directly a responsible party. Exide has also filed its own summary judgment motion on this point, arguing that judgment in *its* favor is **[*11]** appropriate because the United States cannot establish that it is a responsible party under CERCLA as a matter of law for these same reasons. In any case, summary judgment on Exide's liability turns on whether General is liable under either of these two scenarios.

1. General's Successor Liability

In general, "where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor." 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7122 (perm. ed. rev. vol. 1999). However, the doctrine of successor liability permits exceptions to the general rule in four specific instances: when (a) the purchaser expressly or implicitly agrees to assume liability; (b) the purchase is a *de facto* consolidation or merger; (c) the purchaser is a mere continuation of the seller; or (d) the transfer of assets is for the fraudulent purpose of escaping liability. *See id*; *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 308-309 (3d Cir. 1985), *cert. denied*, 474 U.S. 980, 88 L. Ed. 2d 337,

106 S. Ct. 384 (1985) (reviewing Pennsylvania law).[2] Significantly, **[*12]** these theories are recognized as the traditional successor liability rules under *both* Pennsylvania law and federal common law created by some courts to enforce successor liability under CERCLA. *See Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1283-1284 (E.D. Pa. 1994). In addition, some federal courts have recognized another theory of CERCLA successor liability under federal common law that is more relaxed, and therefore easier to meet, than the "mere continuation" exception under the traditional successor liability rules. This theory is known as the "substantial continuity" test.[3] *See United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-838 (4th Cir. 1992).

[*13] The United States contends that General is indirectly responsible for the liabilities of Price under two theories of successor liability. As a threshold matter, the United States argues that this Court should apply federal common law to the question of CERCLA successor liability. Under that federal common law, the United States contends that (1) General's purchase of Price was a *de facto* merger; and (2) the transaction resulted in a continuation of Price under the "substantial continuity" test recognized by many, but not all, federal courts. In the alternative, the United States argues, even if the Court does not apply

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2. Although CERCLA does not provide specifically for successor liability, courts have interpreted the statute as including successor liability, and routinely find successor corporations liable. *See Smith Land & Improv. Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029, 102 L. Ed. 2d 969, 109 S. Ct. 837 (1989).

3. The "substantial continuity" test is also sometimes referred to as the "continuation of the enterprise" test. To avoid confusion, the Court will consistently refer to it as the "substantial continuity" test.

federal common law, it should find that the state law requirements for a *de facto* merger have been met. Again, if General is liable either theory of successor liability, then Exide is liable as well, since the chain of liability from Price to Exide is complete.

Exide denies that General is indirectly liable under any theory of successor liability. It contends that this Court should not apply federal common law, and that under Pennsylvania law, General's purchase of Price was not a *de facto* merger. In the alternative, Exide argues, even if this Court were **[*14]** to apply federal common law, it should not adopt the "substantial continuity" test and instead find only that the requirements for a *de facto* merger are similarly not met under federal common law. Finally, and again in the alternative, Exide contends that even if federal common law and the "substantial continuity" test are applied, the transaction completed between General and Price does not meet this test such that successor liability should pass to General.

The parties have thoroughly briefed the issue of whether this Court should apply federal common law to the case at bar, and if so, whether it should apply the "substantial continuity" test of successor liability. In its sole teaching directly on point, the Third Circuit held that courts should look to federal common law to determine successor liability under CERCLA. The court reasoned that federal common law's uniformity would support CERCLA's broad remedial aim to find successor corporations, and not taxpayers, liable for the costs associated with hazardous substance clean-up. *See Smith Land & Improv. Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029, 102 L. Ed. 2d 969, 109 S. Ct. 837 (1989). **[*15]** The Fourth Circuit subsequently fashioned the "substantial continuity" test as part of that common law in *Carolina Transformer*. A number of circuits followed suit in recognizing that test for successor liability under

CERCLA, while others have declined to do so.[4] The Third Circuit has not specifically endorsed the "substantial continuity" test.[5] However, courts in this circuit routinely apply it in making successor liability determinations under CERCLA. *See, e.g., Gould, Inc. v. A&M Battery & Tire Serv.*, 950 F. Supp. 653, 656 (M.D. Pa. 1997).

[*16] Exide's principal argument as to why this Court should *not* apply federal common law, and especially not the "substantial continuity" test, is that the rationale and authority for applying them have been eroded by U.S. Supreme Court decisions postdating *Smith Land*. The U.S. Supreme Court has indeed cautioned courts regarding the unwarranted creation of federal common law in a number of cases since *Smith Land*. Exide calls the Court's attention to three decisions in particular.

In *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 129 L. Ed. 2d 67, 114 S. Ct. 2048 (1994), the FDIC sued the former counsel of a failed savings **[*17]** and loan for legal malpractice and breach of fiduciary duty, causes of action created under state law. Quoting the familiar passage from

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4. *See B.F. Goodrich v. Betkoski*, 99 F.3d 505, 518-519 (2d Cir. 1996), *cert. denied*, 524 U.S. 926 (1998) (applying federal common law and the "substantial continuity" test); *United States v. Mexico Feed & Seed*, 980 F.2d 478, 487-489 (8th Cir. 1992) (applying the "substantial continuity" test). *Cf. Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1501-1502 (11th Cir. 1996); *City Mgmt Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 253 n. 12 (6th Cir. 1994).

5. The Third Circuit rejected the "substantial continuity" in the products liability context due to concerns that application of the test would violate traditional tort law's causation requirement. *See Polius v. Clark Equipment Co.*, 802 F.2d 75, 81 (3d Cir. 1986). However, such concerns are not present under CERCLA, which imposes strict liability. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259 (3d Cir. 1992).

Erie R.R. v. Tompkins, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), that "[t]here is no general federal common law," the Court held that state law governed the issue of imputation of knowledge to corporate victims of alleged negligence. *O'Melveny*, 512 U.S. at 83-84.

Similarly, in *Atherton v. FDIC*, 519 U.S. 213, 136 L. Ed. 2d 656, 117 S. Ct. 666 (1997), the Court held that state law, and not federal common law, governed the standard of care applicable to the corporate governance of federally chartered banks. The Court instructed that in order to fashion rules of federal common law, the "guiding principle is that a significant conflict between some federal policy or interest and the use of state law ... must first be specifically shown." *Id.* at 218. It cautioned that "[t]o invoke the concept of uniformity ... is not to prove its need." *Id.* at 220. Finally, the Court concluded that there was no evidence of significant conflict or threat to the federal interest **[*18]** if state law standards of care were applied. *Id.* at 225.

More recently, the Supreme Court addressed the issue of indirect liability of a parent corporation for its subsidiaries under CERCLA itself in *United States v. Bestfoods*, 524 U.S. 51, 141 L. Ed. 2d 43, 118 S. Ct. 1876 (1998). In *Bestfoods*, the Court held, *inter alia*, that a parent corporation may be indirectly liable under CERCLA for its subsidiary's actions only if the corporate veil may be pierced. *Id.* at 63-64.

To some extent, *O'Melveny*, *Atherton*, and *Bestfoods* can be construed to undermine the reasoning behind *Smith Land*, since they caution against the creation of federal common law (even when the need for uniformity is asserted) other than when a significant conflict between federal interests and application of state law is concretely

demonstrated.[6] Significantly, however, neither *O'Melveny* nor *Atherton* addressed the creation of federal common law in the context of a cause of action created under a federal statute, such as CERCLA. Furthermore, in *Bestfoods*, the Court specifically declined to address whether the source of the veil-piercing **[*19]** law should be state or federal common law.[7] *Id.* at 64 n.9. Therefore, in the absence of any authority specifically overruling it, this Court remains

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6. In light of these Supreme Court cases, the First Circuit recently declined to adopt federal common law and instead applied state law to a successor liability question in *United States v. Davis*, 261 F.3d 1, 53-54 (1st Cir. 2001). In response, the United States points out that in *Davis*, the First Circuit relied in part on its previous decision in *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir. 1993). In that case, the court applied state law to construe an indemnity agreement between two corporations to apportion liability. The United States argues that in *Boyd*, there was no real federal interest at stake, since rules of successor liability were applied to determine *which of two different defendants* were liable to the government under CERCLA. In the case at bar, a federal interest in forcing a responsible party (and not taxpayers) to pay for environmental clean-up under CERCLA is present, since if Exide is not liable, taxpayers will ultimately pay. As a result, the United States argues, this federal interest bolsters the argument that federal common law should be applied in this case. In addition, the United States notes, the Third Circuit has effectively recognized this distinction by holding that federal common law applies to successor liability issues under CERCLA in *Smith Land*, while also holding that state law should be used to interpret CERCLA indemnification provisions negotiated between two defendants. *See Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 214 (3d Cir. 1994), *cert. denied*, 514 U.S. 1065, 131 L. Ed. 2d 559, 115 S. Ct. 1696 (1995).

7. Significantly, the Third Circuit looks to federal common law to decide this question. *See Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993).

bound by *Smith Land*.[8] In accordance with *Smith Land*, the Court will apply federal common law.

[*20] As noted *supra*, there is no specific guidance from the Third Circuit regarding application of the "substantial continuity" test to the issue of CERCLA successor liability. And *O'Melveny*, *Atherton*, and *Bestfoods* can also be construed **[*21]** to undermine the rationale for applying the "substantial continuity" test as part of federal common law.[9] Significantly, however, even after these Supreme Court decisions cited by Exide, courts in this

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8. Exide also argues that Third Circuit case law since *Smith Land* counsels against applying both federal common law and the "substantial continuity" doctrine as well. *See Smithkline Beecham Corp. v. Rohm & Haas Co.*, 89 F.3d 154, 158 (3d Cir. 1996) (applying state law to construe CERCLA indemnification provision); *Beazer East*, 34 F.3d at 214 (same); *Witco Corp. v. Beekhuis*, 38 F.3d 682, 688 (3d. Cir. 1994) (applying state nonclaim statute to liability question under CERCLA). However, these decisions did not specifically affect that court's *Smith Land* holding, and in fact often cite it with approval.

9. Before these Supreme Court cases, the Ninth Circuit had held open the question of whether to adopt the "substantial continuity" test. *See Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1262-1265 (9th Cir. 1990). After these decisions, however, that court specifically declined to do so. *See Atchison, Topeka & Santa Fe R. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 361-364 (9th Cir. 1998). The Court found that, under this line of cases, there was no evidence that the application of traditional rules of successor liability would frustrate CERCLA's objectives because there was no evidence that traditional state law rules were not already sufficiently uniform and otherwise up to the task of finding successor corporations liable. Significantly, the court held that it need not decide whether, in applying the traditional rules of successor liability, it applied them as federal common law or state law, since the outcome of its analysis was the same. *Id.* at 364.

circuit have continued to apply the test. *See, e.g., Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 12 F. Supp. 2d 391, 405-406 (M.D. Pa. 1998).[10] In any case, the court need not resolve whether federal common law properly includes the "substantial continuity test" since, as a matter of law, Exide is indirectly liable as the successor to Price *both* because (1) General's transaction with Price meets the definition of a *de facto* merger under traditional successor liability concepts recognized by federal common law, *and* because (2) the Price-General transaction meets the "substantial continuity" test as well. Because General is indirectly responsible for Price's CERCLA liability under both of these theories, Exide is liable due to its merger with General.

[*22]

a. *De Facto* Merger Test

Under traditional rules, courts consider four factors to determine whether a transaction is a *de facto* merger:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations.
>
> (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that

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10. Courts in the Second Circuit, which previously expressly adopted the "substantial continuity" test, have continued to apply it in light of these Supreme Court cases as well. *See New York v. Nat'l Servs. Indus.*, 134 F. Supp. 2d 275, 277-278 (E.D.N.Y. 2001).

they become a constituent part of the purchasing corporation.

(3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

(4) The purchasing corporation **[*23]** assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Smithkline Beecham Corp. v. Rohm & Haas Co., 89 F.3d 154, 162 n.6 (3d Cir. 1996) (citing *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir.), *cert. denied*, 474 U.S. 980, 88 L. Ed. 2d 337, 106 S. Ct. 384 (1985)). No one of the factors outlined above is either necessary or sufficient to find the existence of a *de facto* merger. *See United States v. Keystone Sanitation Co.*, 1996 U.S. Dist. LEXIS 13651, No. CV-93-1482, 1996 WL 672891 at *7 (M.D. Pa. Aug. 22, 1996).

First, then, the Court must ascertain if Price's enterprise was continued by General in terms of management, personnel, physical location, assets, and general business operations. As for management and personnel, even viewing the evidence in the light most favorable to Exide, the record on the whole reveals that there was significant continuity of management and almost total continuity of other personnel at the Hamburg Plant after the transaction with General.

There is no dispute that the principal upper-level **[*24]** management figures at Price were all employed by General in various capacities after the sale. Some of these managers continued to have some responsibility for the Hamburg Plant, although they were eventually moved from Hamburg to General's offices in Reading,

Pennsylvania. William Price, Sr., the Chairman of the Board at Price, was employed as a consultant and named to the Board of Directors of General, as well as its Executive Committee, although he was not involved with the day-to-day management of the Hamburg Plant after the transaction. William Price, Jr., the President of Price, came to be employed as an officer of General, although, Exide contends, one without significant administrative duties. Saul Dershwin, Price's Executive Vice President, and Robert Restrepo, the Vice President for Manufacturing of Price, both became officers of General with some responsibility for all General plants, including the Hamburg Plant. Dershwin also became a member of General's Board of Directors. At some point after the sale, Dershwin and Restrepo ceased to have operating responsibilities at the Hamburg Plant, although it is unclear precisely when.[11] Mid-level management remained basically **[*25]** the same, as Warren Werley continued to serve in a significant capacity at the Hamburg Plant. Before the sale, and for an unspecified time thereafter, Werley served as superintendent. At some point after the sale, he became plant manager.

Exide argues that after the sale, there was no continuity of management, since ultimate responsibility for the Hamburg Plant passed to General's Board of Directors and upper-level management in Reading. However, it is clear that *former Price managers became a part* of General's Board and upper-level management after the transaction. Additionally, as for management of the day-to-day plant operations, despite the fact that members of the upper-level management of Price were at some point moved to Reading, Exide has not set forth evidence that

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11. Both Restrepo's and Dershwin's offices were eventually moved to Reading. However, Restrepo's office was not moved until six months to a year after the sale. It is unclear when Dershwin's was moved.

any member of the General management [*26] team was named to a position at the Hamburg Plant or assumed any day-to-day management responsibility there.[12]

Personnel continuity at the lower levels was even greater. The sales personnel were retained. Additionally, union members and other hourly workers were kept on. Ralph Mengel, the Hamburg Plant's Traffic Manager [*27] in charge of transporting batteries to customers, stated in an affidavit that General kept the same employees and management personnel. Robert Schock, a member of the steelworker's union who worked at the plant's smelter, stated in an affidavit that he and his fellow union members continued to work at the plant, under the same supervisors. Finally, Miriam Woerner, who worked in Personnel, stated in an affidavit that no major changes in personnel at the Hamburg Plant were made after the sale.

The location and assets of Price's operations at the Hamburg Plant obviously remained the same. Exide argues that no continuity of assets occurred because the Agreement did not include the sale of the Hamburg Plant itself and its land. However, this analysis fails to appreciate the true nature of the transaction. On February 11, 1966, the real property and Hamburg Plant were sold

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12. Although Exide also argues that environmental management of the plant significantly changed with Price's sale to General, there is no evidence to support this contention. The document Exide offers as evidence of such, a memorandum regarding anti-pollution measures to be taken at the Hamburg Plant, was written in response to a government investigation requiring the company to submit a pollution abatement plan. It therefore is not evidence of a marked shift in the company's environmental policy initiated by new General management. In addition, the document was written over a year and a half after the sale took place, and was authored by Robert Restrepo, a former member of *Price's* management.

by Price to the Greater Berks County Development Fund (the "Fund"), an organization which exists to arrange for low-interest loans, tax credits and development assistance for qualified businesses. The Fund then entered into a mortgage agreement with American Bank & Trust Co. of Pennsylvania, and leased the Hamburg Plant **[*28]** to General. General then effectively made the mortgage payments on the property until 1978, when the deed was transferred to it for a nominal sum. Therefore, as a practical matter, all of Price's assets were transferred to General as part of the transaction between the companies, and all the assets continued to be part of the ongoing business.

The general business operations at the Hamburg Plant remained very similar after the sale to General. General used the same employees and used the same equipment to make the same batteries as had Price. General then used the same employees to sell and deliver the batteries to the same customers. This make sense, since General had assumed Price's obligations under "its existing contracts of every kind and description, oral or written, including ... all contracts for the purchase or sale of goods, materials, equipment, machinery, supplies or services, warranties, leases, licenses, union contracts, royalty agreements, distributor's contracts and employment contracts." One witness. Arthur Kistler, stated in an affidavit that he did not observe any changes to the plant when Price was sold to General.

There is also undisputed evidence that General **[*29]** continued to use the Price name, at least to some extent. Exhibits to the Agreement demonstrate that, at least at one time, General intended to continue the Price name by operating it as its own division — "new Price." Therefore, it required Price to change its name to Price Investment Co., which it did. The United States submits evidence that the company continued to hold itself out using the Price

name after the sale, including: a worker's compensation report generated by the company referring to Price as a division of General in July 1966 (six months after the sale); documents from Brown's invoicing "Price Battery Co." dated August 1966 (seven months after the sale); Price's own use of forms with the name "Price Battery Corporation" at the top in November 1966 (nine months after the sale); and a letter from the Pennsylvania Department of Health addressed to "Price Battery Corporation" in December 1967 (twenty-two months after the sale).

Exide responds that, to the contrary, General did not continue Price's general business operations precisely because it did *not* continue to use the Price name. Exide sets forth its own undisputed evidence on this point. For example, the sign **[*30]** identifying the plant as a Price facility was taken down right away after the sale, and at some unknown point afterward, a new sign with the General name was put up. At least some correspondence from the plant after the sale was written on letterhead identifying it as General, not Price. Additionally, although former Price managers had battery labels created continuing the Price name as a division of General, according to Exide, these labels were destroyed.

There is, however, as noted *supra*, undisputed evidence that the Price name continued to be used formally both inside and outside the company many months after the transaction – evidence that points toward a general continuity of business operations. In any case, however, the Court does not place great emphasis on the continuation of Price's name in this case for two reasons. First, the batteries made by the plant – under both Price and General – were generally not branded with the manufacturer name, but with store brand names, thereby making the "Price" name less significant to customers. Second, regardless of the name by which the company was known,

there is every indication that General continued servicing Price's customers **[*31]** in an uninterrupted fashion.

Under these circumstances, the Court finds that Price's enterprise was continued by General as revealed by the significant continuity in management, personnel, physical location, assets, and general business operations.

Under the second *de facto* merger factor, the Court must consider whether the transaction was marked by a continuity of shareholders such that Price's sole shareholder, William Price Sr., became a constituent part of General. There is no question that General paid for Price's assets as a going concern in part with 100,000 shares of its own common stock, and that after the completion of the transaction, those shares – approximately 4.537% of General's issued and outstanding shares of common stock – were held by Price Sr.

Exide makes two principal arguments as to why these undisputed facts do not satisfy the continuity of shareholders factor. First, it contends that this small percentage of ownership was not enough to make Price Sr. "a constituent part" of General. However, under the *de facto* merger exception, there is no requirement that the seller acquire majority control or any specific percentage of the buyer, only that there **[*32]** be some continuity of shareholder ownership and control. In fact, one court has held that a seller acquiring a percentage as small as .0009% of the buyer nonetheless supported finding a *de facto* merger. *See Keystone*, 1996 U.S. Dist. LEXIS 13651, No. CV-93-1482, 1996 WL 672891 at *7. In the case at bar, the percentage of shares Price Sr. acquired was significant enough to be comparable to the percentages held by the founders of General during that same year.[13] Furthermore, in

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13. The two founders of General, W.A. Shea and H.J. Nozensky, served as, respectively, its Chairman of the Board of Directors

addition to acquiring his shares of General, Price Sr. gained additional control over General when he was placed on its Board of Directors, as well as that Board's Executive Committee. Under these circumstances, Exide's argument concerning the percentage of General acquired by Price Sr. is unavailing.

[*33] Second, Exide argues that because Price Sr. also acquired a significant amount of cash – in fact, cash worth more than the shares of stock he also received – that the transaction should be not treated as a merger. However, there is no support for this contention under the plain reading of this *de facto* merger factor, which – again – merely requires *some* continuity of shareholders. Exide does not cite any caselaw under which a court *required* a seller's shareholders to have received little or no cash (in addition to stock) from the buyer – or indicated a required relationship between cash and stock received – to fulfill the requirements of a *de facto* merger. Under these circumstances, this Court finds that the sole shareholder of Price, Price Sr., became a constituent shareholder of General, and as such there was a continuity of shareholders required by the second *de facto* merger factor.

The third *de facto* merger factor directs this Court to consider whether Price ceased its ordinary business operations, liquidated, and dissolved as soon as legally and practically possible. Price did not formally dissolve as a corporate entity upon the completion of the transaction **[*34]** on February 11, 1966. Indeed, the Agreement required it to hold a cash reserve until December 1966. However, there is undisputed evidence that this factor

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and Chief Executive Officer when it went public in 1960. In 1966, these individuals still served as Directors of the company. In October 1966, W.A. Shea owned 5.12% of General's issued and outstanding shares, and in April 1966, H.J. Nozensky owned 4.44% of General's issued and outstanding shares.

nonetheless supports the conclusion that the transaction should be considered a *de facto* merger. Pursuant to the Agreement, on February 11, 1966, Price immediately transferred all of its operations to General, and immediately amended its articles of incorporation to change its name to Price Investment Company. Within a short period of time after Price was permitted to liquidate its assets under the Agreement, in February 1967, it filed for corporate dissolution, and was dissolved on July 21, 1967. There is no indication that Price Investment Company conducted, or had the capacity to conduct, any business as had Price before the transaction. Under Third Circuit precedent, a transaction may be considered a *de facto* merger when the normal business operations of the seller cease at the time of the sale, even though the seller formally continues to exist as a shell with valuable assets for as long as a year and a half. *See Knapp v. North American Rockwell Corp.*, 506 F.2d 361, 367 (3d Cir. 1974). Therefore, the **[*35]** third factor provides sufficient evidence of a *de facto* merger.

The fourth and final factor — whether General assumed Price's obligations necessary for the uninterrupted continuation of Price's normal business operations — is not seriously contested by Exide. General assumed Price's obligations under "its existing contracts of every kind and description, oral or written, including ... all contracts for the purchase or sale of goods, materials, equipment, machinery, supplies or services, warranties, leases, licenses, union contracts, royalty agreements, distributor's contracts and employment contracts" including the battery breaking contract with Brown's. It is clear that General assumed Price's obligations necessary for the uninterrupted continuation of its normal business operations.

Finally, Exide argues that equitable factors weigh in favor of declining to find that General is the successor of Price under either the *de facto* merger or "substantial

continuity" tests. Arguments that pertain to the failure of General to possess certain knowledge are discussed *infra*. The other principal equitable argument advanced is that General specifically did not assume Price's CERCLA **[*36]** liability under the Agreement. General agreed to "indemnify and save harmless Price" regarding "all ... liabilities of any kind or character ... unless unknown to Price ... arising out of the operation of the business of Price or its subsidiaries in the normal course prior to January 1, 1966." However, General did *not* agree to indemnify Price for liabilities "sounding in tort or liabilities arising out of occurrences for which a tort claim would apply."

Even assuming *arguendo* that CERCLA liability was not assumed by General pursuant to the Agreement, the Third Circuit has held on more than one occasion that under CERCLA, "agreements to indemnify or hold harmless are enforceable between the parties but not against the government." *Smithkline*, 89 F.3d at 158 (3d Cir. 1996) (citing *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 211 (3d Cir. 1994)). "Thus, responsible parties can lawfully allocate CERCLA response costs among themselves while remaining jointly and severally liable to the government for the entire clean-up." *Id.* As a result, if General is a responsible party because it is successor to the liabilities of Price, the terms of the **[*37]** Agreement do not save it from liability. Considering the broad remedial purpose of CERCLA, it is not inequitable to hold General, and therefore Exide, liable for response costs, as opposed to taxpayers. As a result, even viewing all the evidence in the light most favorable to Exide, the Court finds that the purchase of Price by General was a *de facto* merger, and as a result, General is successor to the CERCLA liability of Price.

b. "Substantial Continuity" Test

As set forth in *Carolina Transformer*, the following factors should be considered in deciding successor liability under the "substantial continuity" test:

(1) retention of the same employees;

(2) retention of the same supervisory personnel;

(3) retention of the same production facilities and location;

(4) production of the same products

(5) retention of the same name;

(6) continuity of assets; and

(7) whether the successor holds itself out as the continuation of the previous enterprise.

Carolina Transformer, 978 F.2d at 838.

These are essentially the same factors considered under the first of the four *de facto* merger elements. Numerous courts [*38] have noted the similarities between these two tests. *See Keystone*, No. CV-93-1482, 1996 WL 672891 at *4; *Blosenski*, 847 F. Supp. at 1284 n.22. As set out *supra*, a thorough analysis of these factors indicates that, considering all the undisputed evidence, successor liability is also warranted under the "substantial continuity" test. The Court will not recite these facts again, but will instead address the arguments set forth by Exide why they do not constitute "substantial continuity."

First, Exide contends that General should not be considered a successor to Price's liability because it had no

knowledge or notice of Price's potential environmental liability when it negotiated an arms-length transaction to acquire Price's assets.[14] Indeed, some courts have also added a knowledge component as an additional factor under the "substantial continuity" test. *See United States v. Atlas Minerals & Chemicals, Inc.*, 824 F. Supp. 46, 51 (E.D. Pa 1993); *see also United States v. Atlas Minerals & Chemicals, Inc.*, 1993 U.S. Dist. LEXIS 18411, 1993 WL 482952 at *4 & n.1. (E.D. Pa. Sept. 11, 1993). However, numerous courts have subsequently rejected this [*39] knowledge requirement in order to find CERCLA successor liability under the "substantial continuity" test, since engrafting such onto the test is inconsistent with the broad remedial goals of the statute. *See Andritz*, 12 F. Supp. 2d at 405-406; *Blosenski*, 847 F. Supp. at 1287. As one court explained,

> The purpose of applying the [substantial continuity] theory is to support the goals of CERCLA and to hold *responsible parties* liable, not to hold only those who knew of the potential problems liable. Furthermore, the purpose behind the [substantial continuity] theory is . . . "justified by a showing that in substance, if not in form, the successor is a responsible party."

Gould, 950 F. Supp. at 659 (quoting in part *United States v. Mexico Feed & Seed*, 980 F.2d 478, 488 (8th Cir. 1992) (emphasis added). This is the better rule, and as applied below makes logical sense since there is no general knowledge or intent requirement to be a responsible party under CERCLA.

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14. As noted *supra*, Exide makes this equitable argument regarding knowledge as to why the Court should not find General liable under both the *de facto* merger and "substantial continuity" tests. For the reasons set forth, the argument is unconvincing under either analysis.

[*40] Exide argues that General did not know that (1) battery casings containing lead were dumped by Price, (2) lead in these casings could harm the environment, and (3) CERCLA would subsequently be enacted to redress that harm. However, under CERCLA, there is no doubt that *Price* is liable as a responsible party *despite the fact that it might not have known* that its dumping would cause harm, or that CERCLA would become law in the future. Therefore, there is no reason why failure to possess this knowledge should free *General* from liability — if it is otherwise the successor to Price. Furthermore, although Exide also argues that General did not even know that Price dumped the battery casings, this argument is also unavailing. If, as Exide claims, General did not know such conduct could be harmful to the environment or that liability would eventually attach for it, then this knowledge would presumably have had no affect on its transaction with Price, and there is nothing inequitable about holding General liable — again, if it is Price's successor.

Second, Exide points to the fact that, in conducting a "substantial continuity" analysis, at least one court has warned about placing [*41] too much emphasis on continuity of the same employees, retention of the same production facilities and location, production of the same products, and continuity of assets, since if these factors were determinative, almost no sale of a plant or operating facility would ever be exempt from "substantial continuity." *See Andritz*, 12 F. Supp. 2d at 406. This is a fair concern. In *Andritz*, the court declined to find CERCLA successor liability for the purchaser under the "substantial continuity" test. However, in this case, unlike *Andritz*, there is undisputed evidence that members of Price management were integrated into the management of General and that some of these former Price managers continued to have some responsibilities related to the Hamburg Plant. Significantly, also unlike in *Andritz*, there is no evidence that any new management or supervisory

personnel were installed at the Hamburg Plant by General, or that General modified the Price production techniques. *Id.* Furthermore, again unlike *Andritz*, there is undisputed evidence that the Price name continued to be used by the company, without any reference to General, in documents dated many months **[*42]** after the transaction.[15] *Id.*

Therefore, since General's purchase of Price meets the "substantial continuity" test, General is the successor to the CERCLA liability of Price.

c. General's Direct Liability

The Court concludes that Price is directly a responsible party under CERCLA, and General is *indirectly* the successor to the liabilities of Price under both the *de facto* merger and "substantial continuity" tests. Therefore, since **[*43]** Exide is the successor to the liabilities of General, Exide is liable under CERCLA. As a result, the Court need not determine whether General was itself directly a responsible party under CERCLA.

IV. CONCLUSION

Price is directly liable under § 107(a) of CERCLA, since (1) it disposed hazardous substances at a "facility"; (2) there was a "release" of "hazardous substances" from the facility into the environment; (3) the release required

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15. Exide also compares the case at bar with *Elf Atochem North America v. United States*, 908 F. Supp. 275 (E.D. Pa. 1995), in which the court also declined to find CERCLA successor liability under the "substantial continuity" test. However, in that case, there was no evidence that the purchased company's name was used by the purchaser after the transaction. Furthermore, in that case the seller remained in the business in question, continued to pay its own debts, and in fact remained a competitor of the purchaser. *Id.* at 279-281.

the United States to expend "response costs"; and (4) it "by contract, agreement, or otherwise arranged for disposal ... of hazardous substances owned or possessed...." 42 U.S.C. 9607(a)(3). General is the successor to Price's CERCLA liability indirectly because, under federal common law, its transaction with Price was *de facto* merger and because the transaction meets the "substantial continuity" test. Finally, Exide is indirectly liable because it is, as it admits, successor to the liabilities of General pursuant to its merger with General.

An appropriate order follows.

ORDER

AND NOW, this 27th day of February 2002, upon consideration of Plaintiff's Motion for Summary Judgment on Liability (Docket **[*44]** No. 16), Defendant's response thereto (Docket No. 20), and Plaintiff's Reply (Docket No. 21), as well as Defendant's Motion for Summary Judgment (Docket No. 18), Plaintiff's response thereto (Docket No. 19), and Defendant's Reply (Docket No. 23) it is hereby **ORDERED** that Plaintiff's Motion is **GRANTED**, and Defendant's Motion is **DENIED**.

Judgment on liability is entered in favor of Plaintiff United States of America and against Defendant Exide Corporation.

BY THE COURT:

RONALD L. BUCKWALTER, J.

DISTRICT COURT OPINION ON MOTION FOR RECONSIDERATION OR CERTIFICATION
(2002 U.S. Dist. LEXIS 8790)

United States District Court
for the Eastern District of Pennsylvania

United States of America, Plaintiff,
v.
Exide Corporation, Defendant.

Civil Action No. 00-cv-3057

May 15, 2002, Decided

MEMORANDUM

BUCKWALTER, J.

[*1] Plaintiff, the United States of America (the "United States") brings this action against Defendant Exide Corporation ("Exide") alleging that under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, Exide is liable for costs incurred by the United States in response to the release of hazardous substances at the Hamburg Lead Superfund Site in Berks **[*2]** County, Pennsylvania. The parties filed cross motions for summary judgment. By order dated February 27, 2002, the Court found for the United States and against Exide on the question of liability. Presently before the Court is Exide's Motion for Reconsideration of Order Granting Judgment on Liability or, in the Alternative, for Certification Under 28 U.S.C. § 1292(b). For the reasons stated below, Exide's motion is **DENIED**.

I. Reconsideration Under Federal Rule of Civil Procedure 59(e)

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. *See Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171, 90 L. Ed. 2d 982, 106 S. Ct. 2895 (1986). A court should grant a motion for reconsideration only "if the moving party establishes one of three grounds: (1) there is newly available evidence; (2) an intervening change in the controlling law; or (3) there is a need to correct a clear error of law or to prevent manifest injustice." *Drake v. Steamfitters Local Union No. 420*, 1998 U.S. Dist. LEXIS 13791, No. 97-585, 1998 WL 564486 **[*3]** at *3 (E.D. Pa. Sept. 3, 1998) (citing *Smith v. City of Chester*, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994). "Because federal courts have a strong interest in finality of judgments, motions for reconsideration should be granted sparingly." *Continental Casualty Co. v. Diversified Indus.*, 884 F. Supp. 937, 943 (E.D. Pa. 1995).

Exide seeks reconsideration in this case in order to correct alleged clear errors of law and to prevent manifest injustice. However, a motion for reconsideration is not properly grounded on a request that the court simply rethink a decision that it has already made. *See Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993). With regard to the thicket of questions resolved by the Court in its February 27, 2002 memorandum — both in ascertaining the proper law of CERCLA successor liability and then applying it — that is precisely what Exide asks the Court to do in its motion. The Court declines to do so. Exide's only new argument is that the Court did not view the evidence in the light most favorable to Exide with regard to the continuity (or lack thereof) of Price Battery's corporate name **[*4]** and management at the Hamburg Plant after its transaction with General Battery. However, while both the United States and Exide proffered evidence

on these issues, neither party's evidence directly contradicted the other's. In viewing the evidence in the light most favorable to Exide, the Court need not ignore undisputed evidence offered by the United States.

The Court therefore declines to reconsider its decision to grant summary judgment in favor of the United States and against Exide.

II. Certification of Interlocutory Appeal Under 28 U.S.C. § 1292(b)

In general, a matter may not be appealed to a court of appeals until a final judgment has been rendered by the district judge under 28 U.S.C. § 1291. 28 U.S.C. § 1292(b) creates an exception to the final judgment rule by authorizing a district court to certify an order for interlocutory appeal only if the court finds that: (1) the order involves a controlling question of law, (2) the order presents a question on which there is substantial ground for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination **[*5]** of the litigation. *See Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974). The decision to certify an appeal rests with the sound discretion of the trial court. *See Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1142 (E.D. Pa. 1993). The burden is on the movant to demonstrate that a 1292(b) appeal is warranted. *See Rottmund v. Continental Assurance Co.*, 813 F. Supp. 1104, 1112 (E.D. Pa. 1992).

The Court declines to certify a § 1292(b) interlocutory appeal since Exide has not met its burden of demonstrating that an immediate appeal may materially advance the ultimate termination of the litigation, such as required by the third factor. In evaluating this factor, courts have focused on whether an appeal would (1) eliminate the need for trial, (2) eliminate complex issues so as to simplify the trial, or (3) eliminate issues to make discovery easier

and less costly. *See Zygmuntowicz v. Hospitality Invs., Inc.*, 828 F. Supp. 346, 353 (E.D. Pa. 1993). In this case, in its February 27, 2002 memorandum, the Court did not reach the issue of General Battery's direct liability, a separate **[*6]** theory of recovery which would also render Exide (General Battery's admitted successor) liable to the United States. Therefore, even if Exide were successful on an interlocutory appeal, such a decision would not eliminate the need for a trial on liability and damages. Such an appeal would also not necessarily either simplify any trial needed or reduce the expense of discovery. In cases where triable issues would remain even after a successful appeal, courts routinely deny certification of § 1292(b) appeals because such an appeal will not materially advance the ultimate termination of the litigation. *See, e.g., Orson, Inc., v. Miramax Film Corp.*, 867 F. Supp. 319, 322 (E.D. Pa. 1994) ("[i]n this case, an immediate appeal would not eliminate the need for a trial"); *Zygmuntowicz*, 828 F. Supp. at 353-354; *Piazza v. Major League Baseball*, 836 F. Supp. 269, 272 (E.D. Pa. 1993) ("significantly, several claims may proceed to trial regardless of the disposition"); *Rottmund*, 813 F. Supp. at 1112 ("where the issue involved in the interlocutory order is only one of many triable issues, an interlocutory appeal will not provide **[*7]** a more efficient disposition of the litigation").

All three of the requirements under § 1292(b) must be met in order for a court to grant certification for appeal. *See Piazza*, 836 F. Supp. at 270. Therefore, the Court need not address the first and second factors. However, the Court notes that Exide is persuasive as to whether the order presents questions on which there is substantial ground for difference of opinion, as required by the second factor.

In any case, even if all three factors under § 1292(b) were met (and they are not here), the Court would still be required to exercise its discretion mindful of the strong

policy against piecemeal appeals. *See Orson*, 867 F. Supp. 319 at 321 (citing *Zygmuntowicz*, 828 F. Supp. at 353). The 1292(b) appeal is the exception, to be used only in the rare case where an immediate appeal would "avoid expensive and protracted litigation." *Id.* In other words, the court should consider the potential consequences of both granting and denying the appeal. As described *supra*, granting an appeal at this time would not eliminate need for a trial in this Court on both liability and damages, so **[*8]** it would not materially advance the ultimate termination of the litigation. Additionally, however, neither party suggests that the result of denying the appeal and moving to the damages phase before an appeal is taken will be a particularly expensive or protracted process.

Because Exide has not met its burden of demonstrating that an immediate appeal may materially advance the ultimate termination of the litigation, the Court declines to certify its February 27, 2002 order for a § 1292(b) interlocutory appeal.

An order follows.

ORDER

AND NOW, this 15th day of May 2002, upon consideration of Defendant Exide Corporation's Motion for Reconsideration of Order Granting Judgment on Liability or, in the Alternative, for Certification Under 28 U.S.C. § 1292(b) (Docket No. 27), Plaintiff the United States' response thereto (Docket No. 28), and Exide's Reply (Docket No. 29), it is hereby **ORDERED** that Exide's motion is **DENIED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.

DISTRICT COURT'S ENTRY OF JUDGMENT

United States District Court
for the Eastern District of Pennsylvania

United States of America, Plaintiff,
v.
Exide Corporation, Defendant.

Civil Action NO. 00-CV-3057

ORDER

AND NOW, this 24 day of June, 2003, upon consideration of the parties' Agreed Motion for Entry of Joint Stipulations and Final Order, said Motion is hereby GRANTED and it is ORDERED that:

1. the Joint Stipulations Concerning Costs are hereby entered;

2. this Court having previously found, on February 27, 2002, that defendant is liable to plaintiff under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9706(a), as a matter of law, the Court now finds, based on the Joint Stipulations Concerning Costs, that defendant Exide is liable for response costs at or in connection with the Hamburg Lead Superfund Site through February 2002, in the amount of $6,475,529.20;

3. pursuant to section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), defendant Exide is liable for further response costs or damages to be incurred at the Hamburg Lead Superfund Site; and

4. this Order shall be binding in any subsequent action or actions to recover further response costs for the Hamburg Lead Superfund Site.

Judgment is entered in accordance with the terms of the Joint Stipulation. This Case is Closed.

SO ORDERED THIS 24 DAY OF JUNE 2003

HONORABLE RONALD L. BUCKWALTER
United States District Judge
Eastern District of Pennsylvania

ENTERED
JUNE 25, 2003
CLERK OF COURT

COURT OF APPEALS' DENIAL OF PETITION FOR REHEARING

United States Court of Appeals for the Third Circuit

No. 03-3515

UNITED STATES OF AMERICA
v.
GENERAL BATTERY CORPORATION, INC.; EXIDE CORPORATION,

Exide Corporation, Appellant

(Dated November 4, 2005)

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*,
SLOVITER, ALITO, ROTH, McKEE, RENDELL,
BARRY, AMBRO, FUENTES, SMITH,
FISHER and VAN ANTWERPEN, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Rendell and Judge Ambro would grant rehearing.

BY THE COURT,

/s/ Anthony J. Scirica
Chief Judge

Dated: November 4, 2005

STATUTORY PROVISIONS

Excerpts from
Comprehensive Environmental Response, Compensation and Liability Act of 1980

Pub. L. 96-510, 94 Stat. 2767 (Dec. 11, 1980), *as amended*, 42 U.S.C. § 9601 *et seq.*

Section 101 [42 U.S.C. § 9601]. Definitions

For purposes of this title [42 U.S.C. §§ 9601 *et seq.*] –

. . .

(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

. . .

(32) The terms "liable" or "liability" under this title [42 U.S.C. §§ 9601 *et seq.*] shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act [33 U.S.C. § 1321].

. . .

Section 107 [42 U.S.C. § 9607]. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and

subject only to the defenses set forth in subsection (b) of this section –

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance,

shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i) [42 U.S.C. § 9604(i)].

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 [26 U.S.C. §§ 9501 *et seq.*]. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses. There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by –

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of

such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

. . .

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights.

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this title [42 U.S.C. §§ 9601 *et seq.*], including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

. . .

Section 113 [42 U.S.C. § 9613]. Civil proceedings

. . .

(f) Contribution.

(1) Contribution. Any person may seek contribution from any other person who is liable or

potentially liable under section 107(a) [42 U.S.C. § 9607(a)], during or following any civil action under section 106 [42 U.S.C. § 9606] or under section 107(a) [42 U.S.C. § 9607(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107 [42 U.S.C. § 9606 or 9607].

(2) Settlement. A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement.

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contri-

bution action brought under this paragraph shall be governed by Federal law.

. . .

Section 301 [42 U.S.C. § 9651]. Reports and studies

. . .

(e) Adequacy of existing common law and statutory remedies.

(1) In order to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment, there shall be submitted to the Congress a study within twelve months of enactment of this Act [enacted Dec. 11, 1980].

(2) This study shall be conducted with the assistance of the American Bar Association, the American Law Institute, the Association of American Trial Lawyers, and the National Association of State Attorneys General with the President of each entity selecting three members from each organization to conduct the study. The study chairman and one reporter shall be elected from among the twelve members of the study group.

(3) As part of their review of the adequacy of existing common law and statutory remedies, the study group shall evaluate the following:

(A) the nature, adequacy, and availability of existing remedies under present law in compensating for harm to man from the release of hazardous substances;

(B) the nature of barriers to recovery (particularly with respect to burdens of going forward and of proof and relevancy) and the role such barriers play in the legal system;

(C) the scope of the evidentiary burdens placed on the plaintiff in proving harm from the release of hazardous substances, particularly in light of the scientific uncertainty over causation with respect to –

(i) carcinogens, mutagens, and teratogens, and

(ii) the human health effects of exposure to low doses of hazardous substances over long periods of time;

(D) the nature and adequacy of existing remedies under present law in providing compensation for damages to natural resources from the release of hazardous substances;

(E) the scope of liability under existing law and the consequences, particularly with respect to obtaining insurance, of any changes in such liability;

(F) barriers to recovery posed by existing statutes of limitations.

(4) The report shall be submitted to the Congress with appropriate recommendations. Such recommendations shall explicitly address--

(A) the need for revisions in existing statutory or common law, and

(B) whether such revisions should take the form of Federal statutes or the development of a model code which is recommended for adoption by the States.

(5) The Fund shall pay administrative expenses incurred for the study. No expenses shall be available to pay compensation, except expenses on a per diem basis for the one reporter, but in no case shall the total expenses of the study exceed $ 300,000.

. . .

(3)

Supreme Court, U.S.
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No. 05-1269

In the Supreme Court of the United States

EXIDE TECHNOLOGIES, FKA EXIDE CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the de facto merger rule should be applied as a matter of federal common law or Pennsylvania law for the purpose of determining whether petitioner is liable as a corporate successor under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*

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In the Supreme Court of the United States

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EXIDE TECHNOLOGIES, FKA EXIDE CORPORATION,
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A44) is reported at 423 F.3d 294. The memoranda of the district court (Pet. App. A45-A72) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2005. A petition for rehearing was denied on November 4, 2005 (Pet. App. A80-A81). On January 20, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including April 3, 2006, and the petition was filed on March 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States sued petitioner Exide Technologies to recover the government's costs of responding to the improper disposal of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* The United States District Court for the Eastern District of Pennsylvania ruled that petitioner was liable as the corporate successor of the entity that disposed of the hazardous substances. Pet. App. A45-A79. The court of appeals affirmed. *Id.* at A1-A44. The majority concluded that petitioner was liable as a successor under the de facto merger rule, which the majority applied as a matter of federal law. *Id.* at A1-A27. Judge Rendell, concurring in part and dissenting in part, reached the same result by applying the same de facto merger rule as a matter of state law. *Id.* at A27-A44.

1. Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). That Act "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). It "both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted), overruled on other grounds, *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste con-

tamination may be forced to contribute to the costs of cleanup." *Bestfoods*, 524 U.S. at 56 n.1 (quoting *Pennsylvania* v. *Union Gas Co.*, 491 U.S. at 21).

CERCLA provides the President, acting primarily through the Environmental Protection Agency (EPA), with several alternatives for cleaning up sites contaminated with hazardous substance.[1] As one alternative, EPA can itself undertake response actions, using the Hazardous Substances Superfund. See CERCLA § 104, 42 U.S.C. 9604 (2000 & Supp. III 2003); *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004). The United States can then recover EPA's response costs from responsible parties through a cost recovery action. See CERCLA § 107(a), 42 U.S.C. 9607(a); *Cooper Indus.*, 543 U.S. at 161.[2]

Section 107 of CERCLA "sets forth the scope of the liabilities that may be imposed on private parties and the defenses that they may assert." *Key Tronic*, 511 U.S. at 814. Under Section 107(a)(1)-(4)(A), responsible parties are liable for "all costs of removal or remedial action incurred" by the United States "not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(1)-(4)(A); see *Cooper Indus.*, 543 U.S. at 161.[3]

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[1] CERCLA grants authority to the President, who has delegated various powers to EPA. See Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

[2] CERCLA designates cleanup actions as either "removal" actions or "remedial" actions, and it designates either type of cleanup as a "response" action. CERCLA § 101(23), (24) and (25), 42 U.S.C. 9601 (23), (24) and (25).

[3] The national contingency plan (NCP), promulgated as a regulation pursuant to Section 105, 42 U.S.C. 9605, prescribes requirements for selection and implementation of removal and remedial actions. 40 C.F.R. Pt. 300.

Section 107(a) identifies four categories of responsible parties. 42 U.S.C. 9607(a). They include a person who—by contract, agreement, or otherwise—arranged for disposal or treatment of hazardous substances owned or possessed by such person at any facility owned or operated by another party. See 42 U.S.C. 9607(a)(3).

2. The United States brought this action to recover EPA's costs in responding to hazardous substance contamination at the Hamburg Lead Superfund Site in the Borough of Hamburg, Berks County, Pennsylvania. From the 1940s until early 1966, the Price Battery Corporation (Price) operated a lead-acid battery manufacturing plant in Hamburg that used lead plates from old batteries. Price employees brought the used batteries to the Hamburg plant, split them open, and reused the plates as part of the process of creating new batteries. Price's employees then dumped the junk battery casings, containing lead residue, at various locations in and around Hamburg. Pet. App. A2, A46.

Beginning in August 1993, EPA conducted a removal assessment at two locations where Price had dumped broken battery casings, and EPA found elevated levels of lead far exceeding the applicable removal action levels. See Pet. App. A2, A48. At those and other later-discovered locations, EPA conducted various response actions, including removal of battery casings, excavation and transportation of lead contaminated soil and debris off-site for treatment, installation of paving and soil caps, and additional monitoring. *Ibid.* EPA has generally completed active work, but continues to monitor the locations.

3. Price no longer exists. On February 11, 1966, General Battery Corporation (General) purchased Price and took over operation of the Hamburg Plant. See Pet.

App. A2-A3. Under the purchase agreement, General purchased virtually all of Price's assets, *id.* at A3 & n.1, and General assumed all of Price's existing obligations, *ibid.*, including "its existing contracts of every kind and description, oral or written," *id.* at A62. The purchase agreement and related documents stated that General intended to operate the business of Price as a separate division, identified as "new Price," and Price agreed to change its name, effective as of closing, to Price Investment Co. See *ibid.*

In exchange, William F. Price, Sr., the chairman of the board and sole shareholder of Price, received approximately $2.95 million in cash, and 100,000 shares of General's common stock valued as of the closing at approximately $1 million. Pet. App. A3. Price, Sr.'s stock interest represented approximately 4.537% of General's outstanding shares. *Ibid.* That amount was comparable to the holdings of General's cofounders. *Ibid.* The purchase agreement required that Price, Sr., serve with the co-founders on General's board of directors, and Price, Sr., also served on General's executive committee. *Ibid.*; *id.* at A60.

In 2000, General merged with petitioner, and petitioner has remained in business as the surviving corporation. Pet. App. A2, A48.

4. The United States filed this action against General on June 15, 2000, asserting that Price was liable under Section 107(a)(3) of CERCLA for response costs as a party that arranged for disposal of hazardous substances and that General was a successor to the liabilities of Price. See C.A. App. 47 ¶ 4. Upon General's merger with petitioner, the United States filed an amended complaint, naming petitioner as successor to General's liabilities. See *id.* at 47 ¶ 5. Petitioner did not

contest that it is the successor to General's CERCLA liabilities, or that Price arranged for the disposal of hazardous substances, but it did contest that General was a successor to Price's liabilities.

The district court granted summary judgment to the United States on the issue of liability, holding that General was a successor to Price. Pet. App. A45, A71-A72. The court held, in accordance with Third Circuit precedent, that general federal common law rather than state law governs successor liability. *Id.* at A51-A58; see *Smith Land & Improvement Corp.* v. *Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989).[4] The court rejected the contention that *Smith Land* is no longer valid in light of this Court's subsequent decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), *Atherton* v. *FDIC*, 519 U.S. 213 (1997), and *United States* v. *Bestfoods*, 524 U.S. 51 (1998). Pet. App. A55-A57.

The court also held that it need not resolve whether federal common law should reflect the traditional de facto merger test or the broader "substantial continuity" test, see *United States* v. *Carolina Transformer Co.*, 978 F.2d 832, 837-838 (4th Cir. 1992), because General was responsible for Price's liability under either standard. Pet. App. A57-A58. With respect to the de facto merger

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[4] The parties agreed that, if state law applied, Pennsylvania law would govern the Price-General transaction. The hazardous substance contamination and Price's conduct occurred in Pennsylvania, and Price was organized under the laws of Pennsylvania. See C.A. App. 71¶ 4(a) (purchase agreement). Thus, Pennsylvania "had the most significant relationship to the events and parties and the greatest interest in the successor liability of businesses located, and committing environmental torts, in Pennsylvania." *Smithkline Beecham Corp.* v. *Rohm & Haas Co.*, 89 F.3d 154, 162 n.5 (3d Cir. 1996).

rule, the court concluded that it should consider the "traditional" four factors to determine whether the purchase transaction was a de facto merger. *Id.* at A58-A59 (citing *Smithkline Beecham Corp.* v. *Rohm & Haas Co.*, 89 F.3d 154, 162 n.6 (3d Cir. 1996) (identifying the four factors for a de facto merger under Pennsylvania law); *Philadelphia Elec. Co.* v. *Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir.), cert. denied, 474 U.S. 980 (1985) (citing the same factors as looked to by "most courts")).

The district court concluded that, under the four-factor test, it must determine whether: (1) there is a continuation of the enterprise; (2) there is a continuity of shareholders such that the shareholders of the seller become a "constituent part" of the purchasing corporation; (3) the seller ceased its ordinary business operations, liquidated and dissolved as soon as legally and practically possible; and (4) the purchasing corporation assumed the obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations. Pet. App. A58-A59. The court made detailed findings as to each element, concluding that the Price-General transaction was a de facto merger. *Id.* at A58-A67.

After finding petitioner liable, the district court entered a final judgment in accordance with a joint stipulation concerning costs, under which petitioner agreed that it would be liable for past response costs of $6,475,529.20, and also liable for future costs. Pet. App. A78-A79.

5. The court of appeals affirmed. Pet. App. A1-A44. Applying *Smith Land*, the court held that CERCLA successor liability is determined as "a matter of uniform federal law, as derived from 'the general doctrine of successor liability in operation in most states.'" *Id.* at A6

(quoting *Smith Land*, 851 F.2d at 92, and citing *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993)). The court of appeals agreed with the district court that *Smith Land* has not been undermined by *O'Melveny*, *Atherton*, or *Bestfoods*, or by the subsequent decisions of other courts of appeals in *United States* v. *Davis*, 261 F.3d 1, 54 (1st Cir. 2001) (rejecting the "substantial continuity" test applied as federal common law), and *Atchison, Topeka & Santa Fe Railway* v. *Brown & Bryant, Inc.*, 132 F.3d 1295 (9th Cir. 1997), amended, 159 F.3d 358 (9th Cir. 1998) (also rejecting the "substantial continuity" test). Pet. App. A8-A11, A16.

The court of appeals concluded that the de facto merger rule, as followed in most States, requires application of the four-factor test set forth by the district court. Pet. App. A19-A20 (citing 15 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 7124.20, at 302 (perm. ed., rev. vol. 1999) (Fletcher) (stating majority rule and collecting cases)). The court also found that the majority rule "generally tracks the inquiry under Pennsylvania law." *Id.* at A20 (citing *Smithkline Beecham*, 89 F.3d at 162 n.6 (the "requirements for a *de facto* merger in Pennsylvania are" the four cited factors)).

The court of appeals examined the Price-General transaction in light of the four-factor test and affirmed the district court's conclusion that the transaction constituted a de facto merger. Pet. App. A20. The court concluded that the transaction resulted in continuity of the enterprise because General purchased all of Price's equipment and inventory, assumed tenancy of its plant, continued production of essentially the same products, sold to the same customers, and retained key personnel.

Id. at A20-A21. The court also concluded that the transaction resulted in continuity of shareholders because the shareholder of the seller corporation became "a constituent part of the purchasing corporation." *Id.* at A22 (quoting 15 Fletcher § 7124.20, at 302; *Smithkline Beecham*, 89 F.3d at 162 n.6). The court further concluded that Price "ceased operations, liquidated, and dissolved as soon as legally and practically possible," *id.* at A24, and that the Price-General agreement provided expressly that General "would assume Price Battery's contractual obligations and all other obligations appearing on Price Battery's balance sheet," *id.* at A26.

The court of appeals rejected, however, the district court's alternative ground for its ruling based on the "substantial continuity" doctrine. Pet. App. A27. The court of appeals concluded that the substantial continuity test creates "a more expansive rule of liability than is accepted in most states" and that, in light of *Bestfoods*, that test "is untenable as a basis for successor liability under CERCLA." *Ibid.* (citing *New York* v. *National Serv. Indus., Inc.*, 352 F.3d 682, 687 (2d Cir. 2003)).

Judge Rendell concurred in part and dissented in part. Pet. App. A28-A44. She agreed with the majority's determination "that the fact pattern presented was a *de facto* merger such that successor liability for purposes of CERCLA exists," and she concurred in the court's "ultimate ruling." *Id.* at A28. Judge Rendell disagreed, however, with the majority's view that "the issue of successor liability in this context is controlled by federal common law." *Ibid.* She would have reached the same result under Pennsylvania law. *Id.* at A44.

ARGUMENT

The court of appeals correctly ruled that petitioner is liable under CERCLA as a corporate successor pursuant to the de facto merger rule. In reaching that conclusion, the court expressed its view that Congress has directed the courts to apply a uniform federal rule of successor liability, but both the legal standard and the result would be the same if the de facto merger rule were applied as a matter of state law. The court of appeals' reasoning is consistent in result with that of other courts of appeals that have applied state rules of decision to determine successor liability. Its decision presents no conflict on the specific question at issue—whether petitioner is liable as a successor. Accordingly, there is no warrant for this Court's review.

1. Petitioner incorrectly contends (Pet. 5-9) that the court of appeals' decision in this case conflicts with decisions of this Court respecting the application of federal common law. This Court has cautioned against the unwarranted creation of federal common law, but it has not ruled that courts may never find a federal rule of decision appropriate. The Court has not addressed the question whether successor liability under CERCLA is governed by federal or state law, and the court of appeals' resolution of that issue, whether correct or not, presents no conflict with any decision of this Court.

This Court has recognized that, while federal courts routinely identify federal rules of decision in the course of interpreting federal statutes, they generally do not have license to engage in "the judicial 'creation' of a special federal rule of decision." *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997); see *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994); cf. *Empire Healthchoice Assur-*

ance, Inc. v. *McVeigh*, No. 05-200 (June 15, 2006), slip op. 10-11. If Congress has not expressly displaced an otherwise applicable state rule of decision, the courts may create an overriding federal rule only if there is "a significant conflict between some federal policy or interest and the use of state law." *Atherton*, 519 U.S. at 218 (quoting *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)); see *O'Melveny*, 512 U.S. at 87. This Court concluded that there was no need for a judicially created federal rule of decision in the situations posed in *Atherton* and *O'Melveny*, which each involved liability standards pertaining to federally insured savings institutions.

This case involves the liability of responsible parties under CERCLA for the government's costs of environmental cleanup. While CERCLA sets out a general standard for liability, see CERCLA § 107(a), 42 U.S.C. 9607(a), it does not specifically address when a corporate successor of a concededly liable party may be subject to CERCLA liability. The question has therefore arisen whether the courts should adopt a federal rule of successor liability, as a matter of federal common law, or whether the courts should apply the relevant state law rule of successor liability. This Court's decision in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), which addressed the liability of a parent corporation for the actions of its subsidiary, suggested, without deciding, that federal courts adjudicating such issues under CERCLA should usually look to the general corpus of state law rules respecting corporate liability.[5]

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[5] The Court ruled in *Bestfoods* that a corporate parent that "actively participated in, and exercised control over, the operations of the facility itself," may be held "directly liable in its own right," under Section 107(a) of CERCLA, as an operator of a subsidiary's facility. 524 U.S.

Petitioner contends that the court of appeals' decision in this case to adopt a federal common law rule of successor liability conflicts with *Bestfoods*, *Atherton*, and *O'Melveny*. The court of appeals' decision to apply a federal common law rule, rather than the applicable Pennsylvania rule of successor liability, is arguably in tension with those decisions, which each caution against the adoption of federal common law rules that would displace established state law standards. The court of appeals' decision, however, plainly does not conflict with any of those decisions, because none of them addresses the application of federal common law in the specific context of successor liability under CERCLA. This Court has never had occasion to address the application of federal common law in that context, and while the court of appeals' decision might appear, at an abstract level, to depart from this Court's general teachings, it does not present a conflict warranting this Court's review.

2. Petitioner incorrectly asserts (Pet. 9-11) that the court of appeals' decision conflicts with decisions of the

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at 55. The Court added, with respect to corporate veil piercing, that CERCLA is "like many another congressional enactment in giving no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute,' and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" *Id.* at 63 (citation omitted and brackets in original), quoting *United States* v. *Texas*, 507 U.S. 529, 534 (1993). The Court, however, expressly declined to address whether "in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing," because that question "is not presented in this case." *Id.* at 63 n.9.

First, Second, and Ninth Circuits addressing successor liability. See *New York* v. *National Servs. Indus., Inc.*, 352 F.3d 682, 686-687 (2d Cir. 2003); *United States* v. *Davis*, 261 F.3d 1, 53-54 (1st Cir. 2001); *Atchison, Topeka & Santa Fe Ry.* v. *Brown & Brant, Inc.*, 132 F.3d 1295 (9th Cir. 1997), amended, 159 F.3d 358, 362-364 (9th Cir. 1998). Those decisions all rejected the "substantial continuity" theory of CERCLA-based successor liability. The court of appeals' decision in this case, which also expressly rejected the "substantial continuity" theory of CERCLA-based successor liability, see Pet. App. A27 & n.12, does not create a conflict with those decisions.

a. Before this Court's decision in *Bestfoods*, several courts of appeals had adopted the substantial continuity theory as a CERCLA-specific federal common law rule. See *B.F. Goodrich* v. *Betkoski*, 99 F.3d 505, 518-520 (2d Cir. 1996), cert. denied, 524 U.S. 926 (1998); *United States* v. *Carolina Transformer Co.*, 978 F.2d 832, 837-838 (4th Cir. 1992). As the court of appeals in this case explained, the substantial continuity doctrine provides a broader basis for liability than traditional successor liability tests because, most significantly, it eliminates the requirement under the de facto merger rule of a continuity of shareholders. Pet. App. A27.

Following this Court's decision in *Bestfoods*, the First, Second, and Ninth Circuits declined to employ the substantial continuity doctrine because it departs from traditional common law principles. See *National Servs. Indus.*, 352 F.3d at 686 (the substantial continuity test "is not a sufficiently well established part of the common law of corporate liability to satisfy *Bestfoods*' dictate that common law must govern"); *Davis*, 261 F.3d at 53-54 (accord); *Atchison*, 159 F.3d at 364 (determining not

"to extend the 'mere continuation' exception to include the broader notion of a 'substantial continuation'").

The court of appeals in this case expressly agreed that the substantial continuity doctrine, which "creates a more expansive rule of liability than is accepted in most states," does not provide an appropriate basis for a federal common law rule of CERCLA-based successor liability. Pet. App. A27 & n.12. Citing *Bestfoods*, the court concluded that "CERCLA does not, *sub silentio*, abrogate fundamental common law principles of indirect corporate liability" and that the substantial continuity doctrine is "untenable as a basis for successor liability under CERCLA." *Ibid.* The court of appeals thus reached the same result as the First, Second, and Ninth Circuits in rejecting the substantial continuity theory as a basis for CERCLA-based successor liability, and its decision accordingly creates no conflict with the decisions of those circuits.[6]

b. Petitioner nevertheless asserts that the court of appeals' decision gives rise to a conflict because that court ultimately concluded that petitioner should be subject to CERCLA liability as a successor, under the traditional de facto merger test followed by most States, as a matter of federal common law. Pet. 10-11. Petitioner urges that this Court's review is warranted because, if the court of appeals had adhered to the reasoning of the First, Second, and Ninth Circuits, it would have applied the de facto merger test as a matter of state law. *Ibid.*

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[6] Although the United States relied on the substantial continuity doctrine as an alternative basis for liability in the district court, Pet. App. A52-A53, the United States did not defend the district court's invocation of that doctrine in the court of appeals, see *id.* at A27 n.11, and it has not sought review of the court of appeals' rejection of that theory of liability.

The fact remains, however, that the courts of appeals would all apply the *same* test on the facts of this case. This Court does not grant review to resolve inconsequential inconsistencies among the courts of appeals with respect to their reasoning. See, *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'" (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956))).

3. Petitioner additionally urges (Pet. 11-14) that the court of appeals' decision to apply the de facto merger test as a matter of federal law, rather than state law, presents an important question in its own right that warrants this Court's review. To the contrary, however, that issue is of no practical importance because its resolution in this case would not change the result. As the district court and all members of the court of appeals panel recognized, the district court would have applied the same four-factor test under Pennsylvania law. See Pet. App. A19-A20 (majority decision); *id.* at A44 (Rendell, J., concurring in part and dissenting in part); *id.* at A51-A52 (district court).

As the court of appeals explained, it derived its de facto merger test from the four-factor standard followed by most States. See Pet. App. A19-A20. That test "generally tracks the inquiry under Pennsylvania law." *Id.* at A20; see *Smithkline Beecham Corp.* v. *Rohm & Haas Co.*, 89 F.3d 154, 162 n.6 (3d Cir. 1996) (the "requirements for a *de facto* merger in Pennsylvania" are the same four cited elements); see *Commonwealth* v. *Lavelle*, 555 A.2d 218, 227-228 (Pa. Super. Ct. 1989) (setting forth the four factors). Judge Rendell similarly concluded that there is no conflict between Pennsylvania law and the majority state law rule, observing that "we

need not abandon Pennsylvania law." Pet. App. A44. The district court agreed. See *id.* at A51-A52. The Third Circuit has since reaffirmed that same four-factor test in applying the de facto merger rule under Pennsylvania law. *Berg Chilling Sys., Inc.* v. *Hull Corp.*, 435 F.3d 455, 468-469 (2006) (citing *Philadelphia Elec. Co.* v. *Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir. 1985) (applying Pennsylvania law), cert. denied, 474 U.S. 980 (1985)).

The court of appeals carefully examined the district court's detailed findings under each element of the test and affirmed the district court's conclusion that "the de facto merger criteria are satisfied." Pet. App. A26. Judge Rendell, in concurring as to petitioner's liability, also reached that conclusion, finding that "the fact pattern presented was a *de facto* merger" establishing successor liability. *Id.* at A28. Thus, the majority and Judge Rendell clearly applied the same test, and reached the same result, in concluding that petitioner was liable as a successor.

This Court does not grant certiorari to resolve an asserted conflict among courts of appeals where the resolution of that conflict would not affect the ultimate outcome of the case before it. See Robert L. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002) (citing this Court's denial of a writ of certiorari in *Sommerville* v. *United States*, 376 U.S. 909 (1964), as an example of a case in which "the resolution of the conflict could not change the result reached below, since the petitioner would be liable under either federal or state law"). Every judge that has reviewed this case has correctly concluded that the outcome would be the same whether the de facto merger standard is applied as a uniform federal rule or as Pennsylvania law. There accordingly is no warrant for this Court's review.

4. Petitioner argues (Pet. 14-17) that the district court and the court of appeals erred in concluding that the transaction between General and Price constituted a de facto merger under the prevailing common law standard reflected in Pennsylvania law. Petitioner is mistaken, but in any event, that issue, which rests on a fact-specific application of common law principles, does not present a question warranting this Court's review.

Petitioner contends (Pet. 15) that the court of appeals' application of the de facto merger test diverges from Pennsylvania law because General's stock payment to William Price, Sr., constituted 4.537% of its outstanding shares, which petitioner views as inadequate to establish continuity of shareholders under the de facto merger test reflected in Pennsylvania law. Pennsylvania, like most other States, however, provides that a continuity of shareholders exists if the purchasing corporation pays with shares of its stock such that the shareholders of the seller "become a constituent part of the purchasing corporation." *Smithkline Beecham*, 89 F.3d at 162 n.6; see *Berg Chilling Sys.*, 435 F.3d at 469; *Philadelphia Elec. Co.*, 762 F.2d at 310. The district court and the court of appeals in this case applied precisely that test. Pet. App. A24, A64-A65.[7]

Petitioner argues (Pet. 15) that the "transfer of less than a controlling interest" is insufficient to establish a

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[7] Petitioner's assertions (Pet. 14-15) that no Pennsylvania court has found a de facto merger "without" a stock transfer, and that the "absence" of a transfer is "fatal" or at least creates a "strong presumption" against a de facto merger, are irrelevant because in this case there was a stock transfer. See *Berg Chilling Sys.*, 435 F.3d at 469 (holding under Pennsylvania law that there is "a strong presumption against imposing successor liability" where there is "no stock transfer").

continuity of shareholders.[8] But the state courts, including the courts of Pennsylvania, have not required any minimum percentage stock transfer or any particular stock-to-cash ratio for a transaction. Pet. App. A23 & nn.9-10 (discussing cases).[9] Rather, the courts determine on the facts of a given transaction whether the seller shareholders have become a "constituent part" of the purchasing corporation. See *id.* at A20, A58-A59.[10] The district court here undertook that analysis and correctly concluded that Price, Sr., became a "constituent part" of General. See *id.* at A64-A65.[11]

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[8] Petitioner bases that argument on a "holistic view" of Pennsylvania corporate law and refers to several Pennsylvania statutes relating to shareholder rights to challenge transactions under a de facto merger theory. See Pet. 15-16. Petitioner concedes, however, that those statutory enactments "do not abrogate the equitable principles of successor liability." Pet. 16.

[9] The court of appeals noted, for instance, that continuity of ownership has been found where a seller received 12.5%, 2.27%, and even less than 1% of the buyer's stock. Pet. App. A23 n.10. In *Farris* v. *Glen Alden Corp.*, 143 A.2d 25 (Pa. 1958), cited by petitioner (Pet. 15), the court noted that the seller's stockholders acquired a majority of the purchaser's shares. 143 A.2d at 31. The court did not, however, establish a requirement that there be a majority stock acquisition, nor did the court discuss or establish any particular stock acquisition standard at all. The court simply described the evidence "in the present case," from which it found a de facto merger. *Ibid.*

[10] See, *e.g.*, *Philadelphia Elec. Co.*, 762 F.2d at 310 ("It is the duty of the court to examine the substance of the transaction to ascertain its purpose and true intent."); *Farris*, 143 A.2d at 28 ("to determine properly the nature of a corporate transaction, we must refer not only to all the provisions of the agreement, but also to the consequences of the transaction and to the purposes of the provisions of the corporation law said to be applicable").

[11] Petitioner cites (Pet. 13) a statement by the court of appeals that the state law standard is "somewhat unsettled" as to mixed stock and

In any event, the court of appeals correctly identified the proper four-part test for a de facto merger, whether that test is viewed as a matter of federal or Pennsylvania law. Petitioner's contention that the lower courts misapplied one element of that test to the facts of this case presents no question of national importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2006

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cash transactions. The court of appeals nevertheless concluded that the general test for continuity of shareholders is clear and rests on whether "the owners of the predecessor enterprise become a 'constituent part' of the successor by retaining some ongoing interest in their assets." Pet. App. A24.

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No. 05-1269

In the Supreme Court of the United States

EXIDE TECHNOLOGIES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT MANDATING APPLICATION OF STATE LAW TO FILL GAPS IN FEDERAL STATUTES.

The Government certainly is correct in noting (Gov't Br. at 10) that this Court has not previously addressed the precise issue of successor liability under CERCLA that is presented by this case. That is why this Court's review is needed. Contrary to the Government's argument, the fact that the decision below therefore cannot be in conflict with a prior decision of this Court *on successor liability under CERCLA* does not mean that the decision below is not in conflict with any prior decision of this Court. Rather, the Court of Appeals' decision in this case conflicts with an entire series of precedents by this Court mandating application of state law in situations like that presented here, and that conflict calls for this Court's review.

The most recent of this Court's decisions in this series was decided just two weeks ago. In *Empire HealthChoice Assurance, Inc. v. McVeigh*, No. 05-200 (June 15, 2006), the Court held that federal common law does not displace the state law that is applicable to claims for reimbursement by plan administrators under federal health insurance contracts. Quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 & n.3 (1988), the Court emphasized that "the appropriate inquiry [focuses] on the straightforward question whether the relevant federal interest warrants displacement of state law." Slip op. at 11. Discerning no conflict between any federal policy or interest and state reimbursement law, the Court held that state, not federal, law controlled. *Id.* at 12. The Court rejected an analysis that would have the result turn on the federal nature of the contracts in general, rather than the need for federal law to govern the precise reimbursement issue presented by the case. *See id.*

The decision below is at odds with this analytical framework. It held that federal common law should govern recovery of remediation costs from corporate successors because, as a general matter, CERCLA requires uniform national standards, even though there is no conflict between state successor liability doctrines and any federal interest. A11-A17. The court below thus departed from this Court's instruction that "the prudent course" is "to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Empire*, slip op. at 11, quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979).

The Government acknowledges that the decision below "is arguably in tension with" this Court's decisions and "might appear, at an abstract level, to depart from this Court's general teachings." Gov't Br. at 12. That wording is oblique, but the reality that it seeks to mask is clear: the Court of Appeals' decision is in conflict with the decisions of this Court on use of federal common law to displace state law, and it therefore merits this Court's review.[1]

II. THE DECISION BELOW INCORRECTLY DECIDED AN IMPORTANT QUESTION REGARDING CERCLA LIABILITY BY DISPLACING GOVERNING PENNSYLVANIA LAW WITH A FEDERAL RULE THAT IS AT ODDS WITH STATE POLICY.

Despite the conflict between the decision below and

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1. The court's decision also is in conflict with the decisions of other courts of appeals, including the Sixth Circuit, which the Government's brief studiously ignores. *See* Pet. at 9-11; *cf.* Gov't Br. at 12-15. As the petition makes clear, Exide does not seek review of any conflict regarding application of the "substantial continuity doctrine" discussed in the Government's brief, but of a conflict regarding creation of federal common law.

this Court's controlling precedents, which resulted in the Court of Appeals' erroneous creation of a federal common law of corporate successor liability for asset purchases, the Government says that it opposes review here because the Court of Appeals' error "is of no practical importance." Gov't Br. at 15. This is because, the Government insists, a selection of federal common law, rather than applicable Pennsylvania state law, "would not change the result." *Id.*

The Government's cavalier assumption that Pennsylvania would follow the CERCLA successor liability law created by the Court of Appeals is unsupported by the Pennsylvania decisions and derogative of Pennsylvania's sovereign interest in determining for itself how to structure state corporate liability. Contrary to the implication in the Government's brief, all states' corporate liability laws are not the same – either in general, or on the question of *de facto* mergers. Some states have no *de facto* merger doctrine at all, *e.g.*, *Suarez v. Sherman Gin Co.*, 697 S.W.2d 17, 20-21 (Tex. App.), *writ ref'd, n.r.e.* (Tex. 1985); *Saco River Tel. & Tel. Co. v. Shooshan & Jackson, Inc.*, 826 F. Supp. 580, 582-83 (D. Me. 1993) (Maine law), while others apply the doctrine in different ways. *See, e.g.*, A14 (comparing differences between law of New Jersey and New York).

The Government's brief glosses over the differences by taking a "macro" approach that focuses on the use of a "four-factor standard followed by most States," Gov't Br. at 15, and declares this approach consistent with Pennsylvania law. But the Court of Appeals itself pointed out that any similarity in approach dissolves "when the general standards are applied in specific cases." A12 (footnote citing case examples omitted). Declaring that "[s]tate law does vary substantially on the issue of successor liability," the court observed, "Beneath a veneer of uniformity, the 'entire issue of successor liability . . . is dreadfully tangled, reflecting the difficulty of striking the right balance between the competing interests at stake.'" A12-13, quoting

EEOC v. Vucitech, 842 F.2d 936, 944 (7th Cir. 1988). As the court noted, not all states emphasize "continuity of ownership," one of the four factors referenced by the Government, and disagreements regarding the issues presented by this case – whether liability should result from a "mixed cash/stock acquisition" or where the seller receives a small percentage of the buyer's outstanding equity – are illustrative. A12-14 & nn. 5-6, A23 & nn. 9-10. The court found "no generally accepted common law distinction" on these issues and declared the law at "this frontier of successor liability" to be "somewhat unsettled." A23.

In this context, the Government cannot represent that Pennsylvania will adopt the same solution to these successor liability issues as that adopted for this CERCLA action by the Court of Appeals. The Pennsylvania courts have not addressed the issues and have a variety of solutions that they may consider – informed, perhaps, by the approaches taken by Pennsylvania's neighbors. The New Jersey approach, for example, de-emphasizes continuity of ownership and follows a broad standard that permits liability in cash-only and mixed cash/stock transactions. *See, e.g., Woodrick v. Jack J. Burke Real Estate, Inc.*, 306 N.J. Super. 61, 74-77, 703 A.2d 306, 313-14 (App. Div. 1997), *appeal dismissed*, 157 N.J. 537, 724 A.2d 799 (1998); *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 484-93, 356 A.2d 458, 463-68 (Law Div. 1976). Delaware, on the other hand, largely forecloses *de facto* merger liability altogether where the sale price is not limited to stock. *See Bryant, Griffith & Brunson, Inc. v. General Newspapers, Inc.*, 36 Del. 468, 476, 178 A. 645, 648 (Del. Super. 1935); *Fehl v. S.W.C. Corp.*, 433 F. Supp. 939, 946-47 (D. Del. 1977). The Court of Appeals elected to follow the New Jersey model. *See* A23 & n. 9 (citing *Wilson*).[2] But Pennsylvania successor liability law already

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2. The court derived its rule from nine cases, one-third of which were decided under New Jersey law. *See* A23 nn. 9-10. It also cited two CERCLA decisions by federal district courts in

differs greatly from (and is much less expansive than) that of New Jersey. *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462-63 (3d Cir. 2006) (comparing differences). In fact, the Pennsylvania Legislature has endeavored to align Pennsylvania law on asset sales with that of *Delaware*. *See* Pet. at 15-16 (discussing authorities). In light of these authorities, the Government's speculation that Pennsylvania would follow the Court of Appeals' New Jersey-based federal *de facto* merger model is unfounded.

Of course, it is convenient – especially in the absence of direct state law authority – to assume that Pennsylvania law would conform to the Court of Appeals' decision. That assumption was made by the courts below, with no citation, analysis, or discussion of Pennsylvania authorities to support it. The Government, which, in litigating against Exide below, has advocated both federal common law and an expansive view of Pennsylvania law based (like the CERCLA law created by the Court of Appeals) on decisions of other states, would, of course, be advantaged by such an assumption. But such a view is an affront to the sovereign authority of Pennsylvania to decide its law for itself. If, as this Court's precedents teach, it is *state* law that should govern here, the Government may not impose federal law in its staid through a back-door assumption that Pennsylvania would not create a law of its own. If discernment of Pennsylvania law poses too great a burden

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Pennsylvania, which, of course, were bound under *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989), to apply federal common law. One of those, *United States v. Keystone Sanitation Co.*, 1996 U.S. Dist. LEXIS 13651, *10-*12 & n.5 (M.D. Pa., Aug. 22, 1996), stated explicitly that it was based on federal common law, and the other, *Ametek, Inc. v. Pioneer Salt & Chem. Co.*, 709 F. Supp. 556, 559-60 (E.D. Pa. 1988), said it was applying "the traditional common law test for successor liability" and made no specific reference to Pennsylvania law.

for the federal courts in this proceeding, Pennsylvania has a certification procedure that enables the Supreme Court of Pennsylvania to be consulted about the proper outcome. *See In re Certification of Questions of Law*, 560 Pa. DCIII, 30 Pa. Bull. 519, 520 (Jan. 12, 2000); Pa. IOP 10, 210 Pa. Code § 63.10. But unsupported assumptions about how Pennsylvania law might be determined cannot cure the Court of Appeals' decision or support the Government's effort to avoid this Court's review.

CONCLUSION

The choice of federal or Pennsylvania law to govern liability in this case *is* of practical importance — to the parties, and to the sovereign interests of Pennsylvania and the other states whose law the Court of Appeals has displaced. The Court of Appeals improperly departed from this Court's precedents in displacing state successor liability law and creating a law of its own. This Court should grant certiorari, vacate the decision below, and remand for application of Pennsylvania state law to the successor liability issue.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

EXIDE TECHNOLOGIES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

***AMICUS CURIAE* BRIEF OF THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER EXIDE TECHNOLOGIES**

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EXIDE TECHNOLOGIES,

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AMICUS CURIAE BRIEF OF THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER EXIDE TECHNOLOGIES

Pursuant to Supreme Court Rule 37, the National Solid Wastes Management Association ("NSWMA") files this *amicus curiae* brief in support of the Petition for Writ of Certiorari in the above-captioned case.[1] The written consents of Petitioner and Respondent to the filing of this brief have been filed with the Clerk.

[1]As required by Supreme Court Rule 37.6, the NSWMA states that counsel for the parties did not author this brief in whole or in part and that there are no other persons or entities, other than the NSWMA and its members or counsel, who made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

The NSWMA is a voluntary association consisting of about 2,000 member companies operating in all fifty states, and approximately 100 members within the Third Circuit, all of whom are engaged in the business of providing waste handling, transportation and disposal services to municipal, residential and commercial customers. The NSWMA is especially interested in liability issues, particularly those under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 ("CERCLA" or "Superfund"), which affect companies in the waste management business. During the last twenty-five years, government regulations have become more complex, increasing the cost of waste management services. As a result, there has been a substantial consolidation of the waste management industry. Many NSWMA members have acquired the assets of other companies in the solid waste handling, transportation and disposal business, thus increasing the sophistication and efficiency of waste management in this country. Because of the Third Circuit's liability ruling in the case below, and the uncertainty regarding the scope of successor liability in several other circuits, NSWMA members now face significant, unanticipated, unbargained for, and unquantified but potentially costly CERCLA liability for the prior unrelated actions of the business entities who sold their assets to these individual NSWMA members.

The Third Circuit's ruling is also particularly relevant to NSWMA members because approximately 250, or twenty-five percent, of the sites scheduled for cleanup under CERCLA are landfills that accepted waste from municipal, residential and commercial customers. *EPA Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites*, 63 Fed. Reg. 8197 (February 18, 1998). NSWMA members face potentially significant liability at these Superfund sites and others, many of which are now pending in litigation. For these reasons, the NSWMA has a direct and concrete interest in this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Third Circuit's ruling determined that evolving federal common law, rather than established state law, governs questions of corporate successor liability under CERCLA. The Third Circuit further decided that as a matter of federal common law, questions of successor liability in asset transfers under CERCLA will be determined pursuant to an expansive "de facto merger" test, which is inconsistent with Pennsylvania law. The NSWMA supports the Petition for Writ of Certiorari on the important issue of successor liability under CERCLA for the following reasons.

The Third Circuit's ruling misapplied this Court's controlling precedents, *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) and *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). *O'Melveny* and *Kimbell Foods* establish a strong presumption against the creation of federal common law where, as in this case, the federal statute is otherwise comprehensive and detailed, but contains no language abrogating state common law principles, particularly principles regarding corporate liability.

Proper application of the *O'Melveny* and *Kimbell Foods* test demonstrates that a federal common law rule of successor liability under CERCLA is unwarranted because: (1) Congress did not, in CERCLA, direct the courts to create a federal common law rule of successor liability; (2) the existence of a significant conflict between CERCLA's policies and the use of state law is a precondition to creation of federal common law and no such conflict exists; (3) there is no need for a national uniform rule of successor liability; and (4) a federal common law rule would retroactively upset the well-settled expectations of businesses, including NSWMA members, made in reliance on longstanding state corporate law of successor liability; would disrupt established commercial relationships predicated on that state law; and would create uncertainty in both future commercial transactions and in pending and future CERCLA

litigation involving many millions of dollars in potential liabilities.

By misapplying this Court's precedent, the Third Circuit has also aggravated an existing conflict among the circuit courts, many of which have held that state law, and not federal common law, applies to CERCLA liability questions affecting state-created business entities, including such closely related questions as the capacity of a dissolved corporation to be sued, the liability of limited partners and the validity of an inter-corporate contractual release of CERCLA liability.

ARGUMENT

I. THE THIRD CIRCUIT MISAPPLIED THIS COURT'S PRECEDENTS IN ADOPTING A FEDERAL COMMON LAW RULE ON THE IMPORTANT ISSUE OF SUCCESSOR LIABILITY UNDER CERCLA.

A. The Third Circuit Failed to Properly Apply the Presumption Against Creating A Federal Common Law of Successor Liability Under CERCLA.

In *O'Melveny* and *Kimbell Foods*, this Court reinforced the longstanding presumption against the creation of federal common law. In all but the most extraordinary cases, federal courts should not adopt court-made rules to supplement comprehensive and detailed federal regulatory programs like CERCLA. Within the federal system, the function of weighing and appraising the various issues concerning the nature and scope of liability to impose on various entities "is more appropriately for those who write the laws, rather than for those who interpret them." *O'Melveny*, 512 U.S. at 89 (quoting *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 98 n. 41 (1981) (quoting *United States v. Gilman*, 347 U.S. 507, 512-13 (1954)). *Accord Atherton v. FDIC*, 519 U.S. 213, 218 (1997).

This Court has been especially reluctant to create federal common law rules that preempt well-established rules of state corporate law. In *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991), this Court reiterated that the presumption against creating federal common law

> is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state law standards. Corporation law is one such area.

Id. at 98 (citations omitted). *See also United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (". . . the failure of a statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common law principle, the statute must speak directly to the question addressed by the common law.") (citing *United States v. Texas*, 507 U.S. 529, 534 (1993)); *Burks v. Lasker*, 441 U.S. 471, 478 (1979) ("Congress has never indicated that the entire corpus of state corporate law is to be replaced simply because a plaintiff's cause of action is based on a federal statute."). Significantly, the Third Circuit itself recognized this presumption against creating federal common law in the area of corporate liability "because business decisions typically proceed in reliance upon the applicable state standard." Opinion of September 6, 2005 ("Opinion"), *reproduced in* Pet'r App. at A8 (citations omitted). The Third Circuit simply did not apply the very presumption it acknowledged.

Corporations are creatures of state law, wholly dependent on state law for their existence, rights, powers and liabilities. Accordingly, only in the most extraordinary circumstances should a federal court create a federal common law rule, such as a rule of successor liability, that would preempt state corporate law. *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991).

B. The Third Circuit Failed to Properly Recognize the Absence of Any Language In CERCLA Directing the Replacement of the Existing State Law of Successor Liability.

The threshold inquiry is whether in CERCLA's comprehensive statutory provisions, Congress directed the federal courts to create federal common law to resolve the issue of successor liability. CERCLA contains only one directive to apply federal law, on an issue entirely unrelated to corporate successorship.[2] Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), permits a liable party to bring a contribution action to recover costs from another liable party. Section 113(f) of CERCLA specifically provides that:

> Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law.

42 U.S.C. § 9613(f)(1). Accordingly, in the context of contribution actions among parties determined to be liable, Congress weighed and appraised the various issues, and unambiguously provided that the proced res to be followed and the method for allocating costs among those liable parties must be determined by federal law.

In stark contrast, CERCLA's detailed regulatory scheme does not direct the federal courts to create federal common law to define the scope of liability arising from business transactions, including liability for alleged corporate successors. This Court and the Third Circuit both acknowledge that CERCLA is silent on the issue of replacing state corporate common law. In *United*

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[2] CERCLA Section 101(32), 42 U.S.C. § 9601(32), provides that CERCLA liability shall be construed to be the standard of liability under the Clean Water Act, 33 U.S.C. § 1321. This section does not direct the creation of federal common law, but rather defines CERCLA liability by reference to a federal statute.

States v. Bestfoods, 524 U.S. 51 (1998), this Court addressed whether CERCLA displaced the traditional state common law rule that a parent corporation is derivatively liable for the acts of its subsidiary only when the corporate veil is pierced:

> Nothing in CERCLA purports to reject this bedrock principle, and against this venerable common law backdrop, the Congressional silence is audible.

Id. at 62. More generally, the Court found that CERCLA gave no indication that the "entire corpus of state corporation law is to be replaced" just because the cause of action is based on CERCLA, *id.* at 63, and that any CERCLA-specific rule of derivative liability cannot arise from congressional silence and "CERCLA's silence is dispositive," *id.* at 70. See also Opinion, Pet'r App. at A5 ("CERCLA is not, however, a model of legislative draftsmanship and successor liability is one of its puzzles". . . "the statute fails to address the issue expressly....").

Congress demonstrated its ability to direct that federal common law be used in resolving the procedures for contribution actions under section 113(f). Under *O'Melveny* and *Kimbell Foods*, absent extraordinary circumstances Congress must have intended for state law to apply to other issues for which it did not so direct the federal courts, including the issue of corporate successor liability.

C. The Third Circuit Misapplied the *Kimbell Foods* Test in Determining Federal Law Governs Successor Liability Under CERCLA.

In the absence of this express Congressional directive, there is a strong presumption against the creation of federal common law of successor liability under CERCLA. This presumption can be rebutted only in extraordinary cases after applying the following three-part test: (1) whether there is a need for a national uniform body of law; (2) whether application

of state law would frustrate the specific objectives of the federal program in question; and (3) whether the application of a federal common law rule would disrupt commercial relationships predicated on state law. *Kimbell Foods*, 440 U.S. at 728-29. In *O'Melveny*, this Court further refined the second prong of the *Kimbell Foods* test, holding that creation of "federal common law must be limited to where there is a significant conflict between some federal policy or interest and the use of law." *O'Melveny*, 512 U.S. 87. Elevating the second prong of the *Kimbell Foods* test above all others, *O'Melveny* held further that "our cases uniformly require existence of such a conflict as a precondition for recognition of a federal rule of decision." *Id.* (citations omitted). *See also Atherton v. FDIC*, 519 U.S. 213, 218 (holding that a "significant conflict between some federal policy or interest and use of state law . . . must first be specifically shown") (citations omitted).

For the following reasons, the Third Circuit misapplied the three-part *Kimbell Foods* test, as further articulated in *O'Melveny*, in determining that federal law governs successor liability under CERCLA.

1. No significant conflict exists between CERCLA's policies and application of the state law of successor liability.

CERCLA promotes two primary purposes. The first purpose ensures that those responsible for any damage, environmental harm, or injury from hazardous substances bear the cost of their actions. *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991). This is known as the "polluter pays" policy. Second, CERCLA aims to facilitate efficient and prompt responses to environmental harm. *Id.* Use of state law to determine successor liability would facilitate, not frustrate, these CERCLA policies.

State law under the traditional "mere continuation" and "de facto" merger tests ensures the acquiring corporation has some responsibility for or nexus to the actions of the selling

company by requiring that the acquiring corporation have common management, officers, directors and stockholders with the selling corporation -- *i.e.*, the purchaser is the same corporation in a new corporate form. *Grand Labs, Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277, 1282-83 (8th Cir. 1994); *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977). The selling and acquiring corporations are not wholly distinct, and the purchaser is held liable not for the acts of another entity, but for its own acts during a prior corporate life. These traditional state successor liability rules facilitate CERCLA policies by ensuring that the entity responsible for the harm pays for the harm.[3] These rules respect the well-settled commercial expectations of NSWMA members in the asset acquisitions they participated in over the last twenty-five years.

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[3]Any concern that states in the future will alter their successor liability rules to relieve corporations of CERCLA liability is also unfounded. As Circuit Court Judge Kennedy stated in her concurring opinion in *Anspec*:

> Any fears that states will engage in a "race to the bottom" in their effort to attract corporate business and enact laws that limit vicarious liability are in my opinion groundless. States have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and EPA and they share a complementary interest with the United States in enforcement of laws like CERCLA that are used to remedy environmental contamination. I see no necessity to create federal common law in this area to guard against the risk that states will create safe havens for polluters.

922 F.2d at 1250 (Kennedy, J., concurring). *See also*, Opinion, Pet'r App. at A16. ("As a general matter, we agree it is unlikely that states would attempt to immunize their corporations from CERCLA liability.").

Moreover, the conflicting and unresolved federal common law of successor liability under CERCLA, *infra* at 12, is more likely to result in vigorous, time-consuming litigation on these issues, which will delay rather than expedite remediation. State law, on the other hand, imposes more certain and settled liability principles, which focus on salient, well-established and objective criteria. Accordingly, state law promotes prompt, voluntary cleanups.

The Opinion cites to only two remote, potential conflicts between state successor liability standards and certain secondary purposes of CERCLA. The Third Circuit contends that reliance on state law will allegedly (1) increase CERCLA litigation and transaction costs, and (2) diminish a liquid market in the sale of brownfields assets. Opinion, Pet'r App. at A16.

As set forth *infra* at 11-12, state successor liability standards are vastly more uniform than existing federal common law. Therefore, transaction costs will be lessened by relying on well-established state successor liability standards. In addition, this Court has specifically rejected nationwide litigation and associated transaction costs as a basis for federal common law. *See O'Melveny*, 512 U.S. at 88 (observing that uniformity of law may facilitate "nationwide litigation of the suits, limiting state-by-state research and reducing uncertainty – but if avoidance of these ordinary consequences qualified as an identifiable federal interest, we would be awash in federal common-law rules") (citations omitted).

Similarly, state successor liability rules in no way inhibit the sale of brownfields assets. A brownfields asset is, in layperson's terms, property impacted by the presence of contaminants. A liquid market in brownfields assets means nothing more than the sale of brownfields properties resulting in the expansion, redevelopment or reuse of those properties. Contrary to the Third Circuit's statement, a buyer's CERCLA liability resulting from the sale of a brownfields asset arises not indirectly from any successor liability principles, but rather

directly from the buyer taking title and becoming an owner under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1). As a result, successor liability simply has no bearing on the liquidity of the market for brownfields assets.[4]

2. There is no need for a national uniform federal common law rule of successor liability under CERCLA.

The Third Circuit provided as its primary rationale for creating an expansive federal common law rule of successor liability under CERCLA that "the nature of the federal program, a comprehensive federal liability statute, counsels in favor of national uniformity." Opinion, Pet'r App. at A16. The Third Circuit's reliance on the argument that there is a need for a national uniform rule fails for three reasons.

First, the need for national uniformity is viewed as the most generic and insignificant federal interest, *O'Melveny*, 512 U.S. at 88. Second, the Third Circuit ignores the virtual uniformity of the successor liability doctrine under existing state law. Indeed, the United States, the party charged with enforcing CERCLA, has acknowledged that "the law in the fifty states on corporate dissolution and successor liability is largely uniform." *Anspec*, 922 F.2d at 1249 (Kennedy, J., concurring). *See also,*

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[4] In the Opinion, the Third Circuit incorrectly characterizes a liquid brownfields market as a primary purpose of CERCLA. On the contrary, CERCLA's primary purpose from the outset was to promote prompt cleanup of contaminated property and, as the Opinion notes, Congress did not even enact brownfields provisions until twenty-one years after it first passed CERCLA, Pet'r App. at A14-15, n. 8. Moreover, the 1,619 current CERCLA sites, *National Priorities List*, http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm (last modified Feb. 24, 2006), 71 Fed. Reg. 20016, 20052 (April 19, 2006), represent only a small fraction of the estimated 450,000 to 1,000,000 brownfields properties nationally, U.S. GAO Pub. No. GAO/RCED-95-172, *Title* 3 (June 30, 1995).

Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 159 F.3d 358, 368 (9th Cir. 1998); 15 William Meade Fletcher, et al., *Fletcher Cyclopedia of the Law of Private Corporations*, § 7122 (perm. ed., rev. vol. 2005). The only area of potential non-uniformity in state law arises from a more expansive rule of successor liability, known as the "substantial continuity" test, adopted by only a handful of states, rejected by twenty-two states and the Third Circuit, and applied exclusively in the products liability context. *City Mgmt. Corp. v. U.S. Chem. Co., Inc.*, 43 F.3d 244, 252 (6th Cir. 1994); *Restatement (Third) of Torts: Products Liability* § 12 cmt. c Reporters' Note (1998). There is no need for a uniform federal common law of successor liability, because a well-established, uniform body of state successor liability law exists already.

Third, creation of federal common law has not created uniformity. There is simply no established body of federal common law successor liability. In fact, profound disagreements about the content of the federal common law of CERCLA successor liability exist, and the lower courts directly contradict each other on threshold issues regarding the scope and predicates for successor liability. *See, e.g., Atchison*, 150 F.3d at 363 n. 5 ("While state law on successor liability is well-developed and uniform, the Courts that have attempted to fashion federal common law rules for successor liability under CERCLA have created conflicts and uncertainties over a number of issues. . ..") (citations omitted). *See also Anspec*, 922 F.2d at 1250-1251 (Kennedy, J., concurring) ("State corporate law, evolved over decades and frequently identified in state statutes, is well developed and easily discovered and applied. By contrast, at least in the near term, there is no established body of federal common law on the issues presented in this case"). The Third Circuit describes the federal common law standard it adopts as "somewhat unsettled at this frontier of successor liability." (Opinion, Pet'r App. at A23.) Using state successor liability doctrine as a guide, it would take decades for a coherent and consistent body of federal common law of successor liability to develop under CERCLA.

In sum, the purported nationally uniform federal common law of successor liability is illusory, given the current unsettled and conflicting law throughout the federal circuit courts. In direct contrast, there is near uniformity in existing state successor liability law. Therefore, there is no need for federal common law of successor liability under CERCLA.

3. Application of a federal common law rule of successor liability under CERCLA would disrupt commercial relationships predicated on existing state law.

The purpose of the general rule of non-liability in asset transfers is to promote predictability in corporate transactions and free alienability and transferability of property. *Polius v. Clark Equip. Co.*, 802 F.2d 75, 83 (3d Cir. 1983). In particular, "[p]redictability is vital in the corporate field. . . . Major economic decisions, critical to society, are best made in the climate of relative certainty and reasonable predictability." *Id.* Free alienability of property is an equally important policy underpinning state successor liability law. To this end, the general rule of non-liability under state law encourages desirable commercial transactions by reducing the buyer's risk of loss and uncertainty concerning the value of the assets purchased, making buyers and sellers more willing to enter into the asset transaction.

At the same time, traditional state corporate law recognizes the need to protect creditors from corporate transactions designed to avoid liability. For this reason, state successor liability doctrine strikes an appropriate balance between these competing policies by reinforcing the general rule of non-liability in asset transactions and at the same time creating narrow exceptions to this general rule where there is a need to prevent a creditor from unjustly being left with no recourse. For decades, NSWMA members and other asset purchasers have engaged in asset acquisitions in reliance on this settled, developed, easily discovered and applied traditional rule of non-liability in asset transfers. Indeed, the price paid by the

buyers to the sellers in these transactions reflected the parties' understanding of who would be responsible for the sellers' liabilities.

In contrast, the creation of an as yet undetermined and potentially expansive new rule of successor liability under CERCLA, which would be imposed retroactively on transactions completed decades ago, would undeniably disrupt these prior commercial relationships predicated on established state law. For example, an expansive rule of successor liability violates the policy that there is a need for certainty in transactions, as recognized in *Polius*, 802 F.2d at 83, because an expansive rule of successor liability increases the purchaser's risk of unanticipated liabilities. The imposition of successor liability on a purchasing company long after the transfer of assets defeats the legitimate expectations the parties held during negotiation and sale. CERCLA liability creates particular uncertainty because of contingencies regarding the extent and cost of cleanup, the allocation of liability among responsible parties, and the presence of potential "orphan shares" attributable to insolvent and defunct entities. In sum, adoption of an expansive federal rule of successor liability will displace and negate decades of well-established state law on successor liability, on which businesses properly have long relied.

The Third Circuit's Opinion also wreaks havoc on the ability of companies in the waste industry and others to structure future commercial transactions. Companies attempting to structure business transactions in the future cannot know what the federal common law in a particular court will require and how it may differ from state corporate law that will continue to govern all other aspects of the proposed transaction. The end result is that commercial transactions will either be made without the ability to accurately assess potential future liability, or in many cases, will be avoided.

Assuming, *arguendo*, that a consistent federal common law rule of successor liability endorsing an expansive rule of successor liability is developed, such a rule will in and of itself

have a chilling effect on asset transfers. A rational prospective purchaser will be reluctant to acquire the assets of a business because, as stated above, it will be extremely difficult to predict or project with any degree of accuracy the contingent liabilities of the seller at all locations where it has ever in the past disposed of, treated or used hazardous substances in any phase of its operations. Quite often these contingent liabilities will exceed or even dwarf the value of the purchased assets, thus rendering the assets worthless, and making purchasers unwilling to consummate the transaction. Similarly, under an expansive successor liability rule, a company that desires to cease its operations and sell its assets will have a difficult time locating a single buyer for all of its assets at a favorable price. Instead, the selling company will be forced to sell its assets piecemeal at a less advantageous price. The net result is that assets will not be sold or purchased at their true value. Asset purchasers will be unwilling to acquire a fully integrated business unit from a seller for fear of being saddled with successor liability. Valuable assets will be left to whither on the vine, with a net loss to the seller who is unable to realize the full value of its business unit in a sale. This in turn will result in an economic loss to society.

Finally, the issue of successor liability arises in the vast majority of pending CERCLA cases as a result of the ubiquity of asset transfers and CERCLA's retroactive reach. Millions of dollars of remedial costs are at stake in these cases. The shadow of an unknown or worse yet an expansive federal successor liability rule will, at a minimum, require extensive additional litigation and transaction costs regarding these issues, and may improperly determine many of these successor liability issues.

II. THE THIRD CIRCUIT'S MISAPPLICATION OF THIS COURT'S PRECEDENTS IN ADOPTING A FEDERAL COMMON LAW RULE OF SUCCESSOR LIABILITY UNDER CERCLA HAS CREATED A SHARP CONFLICT AMONG THE COURTS OF APPEALS.

In choosing to create a federal common law of successor liability under CERCLA, the Third Circuit compounded an existing and growing conflict among the circuit courts on the issue of successor liability and on a variety of closely-related CERCLA liability issues regarding state-created business entities. The Third Circuit's creation of a federal common law of successor liability under CERCLA conflicts with the First Circuit's decision in *United States v. Davis*, 261 F. 3d 1, 53-54 (1st Cir. 2001) and the Sixth Circuit's decision in *City Mgmt. Corp. v. U.S. Chemical Co.*, 43 F.3d 244, 250 (6th Cir. 1994), which held that the state law of successor liability applies under CERCLA. The Third Circuit's rejection of the "substantial continuity" test under federal common law conflicts with the Fourth Circuit's decision in *United States v. Carolina Transformer Co. Inc.*, 978 F.2d 832, 837-38 (4th Cir. 1992), and the Eight Circuit's decision in *United States v. Mexico Feed & Seed Co., Inc.*, 980 F.2d 478, 487 n. 9 (8th Cir. 1992) (dicta), which endorse, as federal common law rule, the substantial continuity exception. Finally, the Ninth Circuit in *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 682, 686-87 (9th Cir. 2003) and the Second Circuit in *State of New York v. National Services Industries, Inc.*, 352 F.3d 682, 686-87 (2nd Cir. 2003) have rejected the "substantial continuity" test under CERCLA, but did not state whether they rejected the test under federal common law or rather by adoption of state common law.

The Third Circuit's ruling also creates a sharp conflict with the decisions of sister circuit courts on three closely-related CERCLA liability issues concerning corporate law. First, on the threshold issue of whether a business entity is legally cognizable and subject to CERCLA claims, the courts of appeals have consistently relied on state law. In particular, the Seventh,

Eighth and Ninth Circuits have applied state corporate law to determine the capacity of a dissolved corporation to be sued under CERCLA. *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019-20 (7th Cir. 1995); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987); *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 746 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). In light of these opinions, the Third Circuit's Opinion creates the anomaly that state law determines whether a corporation has the capacity to be sued in the first instance, but federal common law is determinative on the issue of successor liability. By way of example, state law applies to situations where a CERCLA claim is made against a company that dissolved, but has not transferred its assets, while federal common law applies where a claim is made against a company that transfers its assets before dissolving.

Second, the Eleventh Circuit has applied state law rather than federal common law to determine the analogous issue whether limited partners are liable for the acts of a limited partnership under CERCLA. *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501-02 (11th Cir. 1996). In *Redwing*, a case decided after *O'Melveny*, the Eleventh Circuit applied the *Kimbell Foods* test and held that, given the popularity of the limited partnership structure as a means of organizing businesses, "we hesitate to upset the expectations investors have under current state law rules by adopting a federal common law rule." 94 F.3d 1502. The exact same concerns counsel against the Third Circuit's creation of a federal common law rule of successor liability under CERCLA.

Third, the circuit courts, including the Third Circuit, have consistently relied upon state law to determine the validity and interpretation of contractual releases and indemnifications of CERCLA liability contained in contracts between potentially responsible parties. *Aluminum Co. of Amer. v. Beazer East, Inc.*, 124 F.3d 551, 565 (3d Cir. 1997); *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 212-15 (3d Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995); *Olin Corp. v. Consol. Aluminum Corp.*, 5 F.3d 10,

15 (2d Cir. 1993); *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993). Again, the Third Circuit's Opinion creates the anomaly that in interpreting a sales contract, state law determines the scope and effect of any release or indemnity, but federal common law determines whether the very same contract creates successor liability.

III. CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

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